Chapter LXVIII.

PRESENTATION OF TESTIMONY IN AN IMPEACHMENT TRIAL.

2155. The judgment of the Lords in impeachments is given in accordance with the law of the land.

The trial of impeachments before the Lords is governed by the legal rules of evidence.

In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England," on the subject of impeachments.

Judgment. Judgments in Parliament, for death, have been strictly guided per legem terrae, which they can not alter; and not at all according to their discretion. They can neither omit any part of the legal judgment, nor add to it. Their sentence must be secundum, non ultra legem. (Seld. Jud., 168,

[1] Rules as to evidence in Blount's case (see. 2309) and Pickering's case (see. 2331).

[2] Subpoenas issued by direction of a committee. Section 2463 of this volume. As to issuing process. Section 2483. Senate decides as to attachment of witness. Section 2152. Witness excused. Section 2394.

[3] Objection to evidence by a Senator. Section 2268.

[4] A person charged with impeachable offense not compelled to furnish evidence against himself. Section 2514.

[5] Exhibitions in nature of evidence not to be attached to articles. Section 2124. Briefs as to pleas to jurisdiction filed during presentation of testimony. Section 2125. Testimony not in order during voting on the articles. Section 2396.

[6] See also sections 2082–2089, 2138, 2226, 2230, 2239.

171.) This trial, though it varies in external ceremony, yet differs not in essentials from criminal prosecutions before inferior courts. The same rules of evidence, the same legal notions of crimes and punishments, prevailed; for impeachments are not framed to alter the law, but to carry it into more effectual execution against too powerful delinquents. The judgment therefore is to be such as is warranted by legal principles or precedents. (6 Sta. Tr., 14., 2 Wood., 611.) The chancellor gives judgment in misdemeanors; the lord high steward formerly in cases of life and death. (Seld. Jud., 180.) But now the steward is deemed not necessary. (Fost., 144; 2 Wood., 613.) In misdemeanors the greatest corporal punishment hath been imprisonment. (Seld. Jud., 184.) The King's assent is necessary in capital judgments (but 2 Wood., 614, contra), but not in misdemeanors. (Seld. Jud., 136.)

2156. In the Belknap trial the Senate directed the managers and counsel for respondent to furnish to one another lists of the witnesses they proposed to call.

The Senate denied in the Belknap trial the application of respondent's counsel for a statement of the facts which the managers expected to prove by each witness.

Form of a motion submitted by counsel for respondent in an impeachment trial.

On June 6, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, an order was made providing that on July 6, 1876, the Senate would proceed to hear the evidence on the merits of the trial in this case.

Thereupon Mr. Montgomery Blair, of counsel for the respondent, submitted this motion:

In the Senate of the United States sitting as a court of impeachment.

THE UNITED STATES

v.

WILLIAM W. BELKNAP.

William W. Belknap, by his counsel, moves the court that an order be made upon the managers on the part of the House of Representatives to furnish within twenty-four hours to the accused or his counsel a list of the witnesses whom they intend to call, together with the particulars of the facts which they expect to prove by them.

It being stated on behalf of the managers that a large portion of the testimony, and especially the material testimony, had been printed, Mr. Blair said:

Of course in respect to that part of the testimony which has been printed, it is very easy to furnish it to us; but I beg leave to say that there is a large portion of the testimony taken before the Judiciary Committee of which we are not at all informed, which we have applied to the managers for copies of, but they repelled us and refused to give them to us. We do not know what part of it they may rely on at all. We have rumors of its character from the press; but we do not know what part of it they mean to rely upon, or what facts they mean to rely upon; and as we are ordered to prepare, we want to make that preparation to meet such case as they may make.

Mr. Allen G. Thurman, a Senator from Ohio, asked this question:

Is there any precedent for the order asked for, either in impeachment trials or in ordinary courts of criminal jurisdiction?

To this Mr. Jeremiah S. Black, of counsel for the respondent, replied:

No; but certainly there ought to be one made. * * * We do not go upon precedent here; that is, this application is not founded upon anything that has ever happened before. There never was a case like this before. I have never heard whether the managers object to this order or not. If they do, I cannot conceive for what reason. Certainly they do not intend to keep us in ignorance of the kind of

[1] First session Forty-fourth Congress, Senate Journal, p. 951; Record of trial, pp. 167–169.

case they are going to produce against us and take us by surprise and then proceed and run over us and get a conviction against us on grounds that we have no notice of. They do not think it is unfair, I suppose, to tell us beforehand what sort of facts they intend to produce.

They have their witnesses here, or at least within easy reach. Ours are scattered all over the continent; some of them in California, others in the Indian Territory. It becomes absolutely necessary for us, as soon as we can, to get out our subpoenas for witnesses and use all diligence in bringing them here. If the trial is to go on upon the 6th of July or at any other time, even a month later than that, we will be hard pressed for time. We can not know what particular witness we need or how many of them unless we are informed of theirs and understand what facts they mean to prove or try to prove.

I maintain, as to every public accuser, a manager of the House of Representatives, an attorney-general, or district attorney, if he has a criminal case which he intends to prosecute against a citizen, that he is bound by his duty and as a lover of justice to disclose the whole case to the defendant as fully as possible and at the earliest moment.

The gentlemen say, when we ask them for this list, that it is a secret which they have the right to keep and they will keep it until the moment of the trial and then spring it upon us, so that we shall be unable to meet it by contradiction or explanation. They wish to take us by surprise as much as possible, and convict the defendant, if they can, without giving him a chance to show his innocence. They say there is no precedent for such a call as we make upon them now. Nothing like this is found in the common-law cases. I do not know how far back they want us to go for a precedent old enough to suit them. In modern times it has never been refused. I admit that by the common law, whose authority they invoke, a man on trial in any criminal court had no chance at all for life or liberty. He was not allowed counsel. He was not allowed to call witnesses. He was not confronted with the witnesses against him. None of those privileges which are secured in our Constitution were given to a party charged with a criminal offense by the ancient common law. That common law was a bloody old beast.

Mr. Manager Scott Lord, on behalf of the House of Representatives, said:

What is the proposition which the counsel makes? It is no more and no less than this, that he has the right to invade the room of the managers, that he has the right to ascertain their course of trial, that he has the right to know every possible witness to prove a certain fact.

Sufficient it is to say that the wisdom of all the ages is against it. The learned counsel had better devote himself to answering the question of the Senator, and find whether in all the past ages a single precedent of this kind has been had in any criminal proceeding. It is not enough for him to rise here and say he did not hear the managers object. He may possibly have been out of the room. It is not enough for him to stand here and say, "We need to make a precedent in this case." It is enough for us to answer that he asks for an extraordinary precedent, extraordinary proceeding, against the wisdom of all the past, and in regard to which he can not find the first authority in rummaging through all the books of the common law and all the books relating to criminal jurisprudence. I am surprised that any such proposition should be seriously made here, that we should be compelled, in advance, to disclose to him the names of witnesses and what each witness is expected to testify to, when we have laid before him in the broadest manner every charge that we make, and one article of these articles of impeachment contains seventeen specifications.

The order proposed by counsel for respondent was disagreed to by the Senate, without division.

The Senate then agreed to this order:

Ordered, That the managers furnish to the defendant, or his counsel, within four days, a list of witnesses, as far as at present known to them, that they intend to call in this case; and that, within four days thereafter, the respondent furnish to the managers a list of witnesses, as far as known, that he intends to summon.

2157. In the Belknap trial the Senate adjourned to await the attendance of a witness declared by the respondent, on oath, to be "material and necessary for his defense."

The Senate declined to postpone formally the Belknap trial to await the attendance of a witness for the respondent.

Respondent's application in the Belknap trial for delay to await a witness's arrival was not required to be accompanied by a statement as to what he would prove.

Form of respondent's application for delay to await a witness in an impeachment trial.

On January 12, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, after the testimony for the respondent had proceeded some time, Mr. Matt. H. Carpenter, of counsel for the respondent, announced that one witness whom they had asked to have summoned—John S. Evans—had not appeared. He said that his presence was necessary at this stage, and asked the Senate sitting, for the trial to adjourn some reasonable time for Mr. Evans to arrive.

To this the managers on the part of the House of Representatives objected.

Mr. Manager George F. Hoar said:

I understand the rule and practice to be perfectly well settled and enforced in all courts where justice is administered according to the forms and practice of the common law that a party in a civil or criminal case applying either for a continuance or a postponement on account of the absence of a witness must show—

First. That the witness has been duly summoned;

Second. That the evidence which the witness would give if present is material and important to his cause; and,

Third. That the evidence must be so set forth that the opposite party may, if he choose, elect to admit that the witness, if present, would so testify; not to admit the fact, but that the witness, if present, would so testify; and that election is always tendered to the opposite party.

There is but one exception to the universality of that rule, which is, that where the evidence is of itself of a character which the witness only could state, that is not required of the party, as, for instance, if the question were of the construction of a dam which had been taken away, the scientific expert under whose direction that structure was built would be the only person who could describe it, and it would be impossible for the party ordinarily to say what his witness would testify to on that subject if he were present; but with that exception, of the evidence of experts where it is of such a character that the evidence could not be understood by the party who undertakes to set it forth, the rule is universal.

In the present case I fully concede that the defendant's counsel ought to stand before the Senate as if they had summoned the witness. They applied to the Senate for a subpoena. The Senate granted the order. The Sergeant-at-Arms did not execute it because, as he understood, there had been a subpoena issued already and served at the instance of the other party. So we agree that the defense stands here in all respects having used all diligence to obtain the presence of this witness; but the defendant shows no reason whatever why he should not state the evidence which Mr. Evans would give if he were present and give us an opportunity to elect to consent to that evidence. In fact, Mr. Evans, it appears, has been twice examined very fully in regard to this whole transaction before two different committees of the House. It is true that there was nobody present at that examination representing the defendant, and therefore certainly it is true that the defendant can not be sure that the facts favorable to him within Evans's knowledge were brought out in that examination. I do not overlook that. I make that concession also as fully as the learned counsel could desire. Still, either he can state what Mr. Evans would testify if he were present, and his reasons for believing that he would so testify, or he has no reason to believe that Evans's testimony would be valuable to him if he were here. He can not escape, as it seems to me, that dilemma. Either he has no reason to suppose that Mr. Evans would be more important to him than any other citizen of the United States who is at a distance of a thousand miles from this place or he can state what it is that this witness knows and would prove, and give us the opportunity to make our election.

I conceive that any distinction in practice which has grown up in State courts between a first continuance from term to term and a second continuance from term to term has nothing whatever to do

[1] First session Forty-fourth Congress, Senate Journal, pp. 976, 977; Record of trial, pp. 258–261.

with this matter. This is not a court having terms. It is a court which expires with its first and only term. This is not the case of an application for a continuance of a trial made before trial. It is a case where the trial has begun and has proceeded with the full consent in this particular of both parties. The evidence is fresh in the minds of all the members of the court. This, therefore, is a simple application for the postponement of a trial which is already far advanced toward its termination.

My associate [Mr. Manager Jenks] desires me to state the case of the trial of Smith and Ogden in the circuit court of the United States, where Judge Paterson establishes the rule that I have stated.

Mr. Montgomery Blair, of counsel for the respondent, said:

It is proposed, I suppose, from this initiatory proceeding, to treat this as an application for a continuance. Everything that has been said proceeds upon the assumption that we have applied for a continuance of this case, whereas we only ask that a witness who has been duly summoned, who ought to be here now, for whose absence we are not responsible, should be allowed a reasonable time to make his appearance, being detained by freshets or some other cause for which the party defendant is not in any way responsible. We have no disposition to abuse the patience of this body. We do not expect a delay beyond the time when the Senate will be in session in the transaction of its other business. We do not expect to detain this body with any long speeches. We have evinced no disposition whatever at any time, as I may appeal to the experience of every gentleman who hears me, to abuse the patience of this body in any respect, and above all not to try any sharp practice upon this body, but to have a fair trial.

I utterly protest against the application of rules derived from other proceedings altogether to the occasion which has arisen now, which is not an application for a continuance. We only ask that this body will wait until a man who has been summoned by its order makes his appearance here so that we may proceed with our examination.

While I am up I will say, however, that my learned friend on the other side and the very learned gentleman who makes this proposition are altogether mistaken or I am in regard to the rules of practice about what terms a party is to have who makes his application for a continuance. The gentleman who is associated with me has said that on application for a second continuance under the rules of the State in which I have practiced the party is required to state what the witness is expected to prove. The practice which prevails in the circuit court of this District and in Maryland, as my learned friend who represents that State on this floor [Mr. Whyte] will bear me out, is that where a party makes an application for a continuance, and states what he expects to prove by the witness, that proof is assumed to be a fact, not that the witness has proved it, but it is assumed to be a fact, an indisputable fact, according to the practice prevailing in this District, and in Maryland, from which State we derive the practice that prevails in the District. So that if the rule is to be enforced here, and the analogy is to be taken from the practice prevailing in this District, if we state what we expect to prove by this witness, and they proceed to trial, what we expect to prove is assumed to be an undisputed fact. That is the law of this District and the practice of the courts of the United States in the District of Columbia. That is a peculiar law. It does not prevail in the other courts with which I am familiar. It does not prevail in Missouri, where I practiced a great many years; but it is a law of this District and of Maryland. So then there are differences in respect to the laws of the different States. There is no uniform law on this subject. There is no common law upon this subject. There is none here recognized by this body. This court will have to make a rule for itself, and especially will it have to make a rule for itself in a proceeding which is not a motion for a continuance, but a motion for the delay of this trial until a witness can reach here who has been duly summoned. * * *

And, in response to a question by Mr. Manager Hoar, Mr. Blair said:

The gentleman knows perfectly well that when cases are called for trial in the ordinary courts of judicature the parties are asked whether they are ready for trial, that then and there the parties announce whether they are ready or not, and that motions for continuance are made and settled before they proceed to trial. Here there has been no occasion of that kind. We have been required to go to trial on this occasion without any "ifs "or "ands" about it, whether we were ready or not. We have been appointed a given day to be here. We have been notified that our witnesses would be summoned, and we have had the allowance of a committee of this body to summon them. We put their names in the hands of the officer to summon them. He has summoned them; and it is not our fault that this witness is not here. The analogies of the gentleman break down. One of the most unjust things in this world is to apply false analogies. It is the most misleading of all modes of reasoning.

Mr. Jeremiah S. Black, also of counsel for the respondent, argued:

I deny utterly the rule which they lay down with so much emphasis as being the true and only rule applicable to such a case—that is, that when a party is caught with an absent witness whom he had used all diligence to get here, and who he had good reason to believe would be here—it is either fair or just or law to push him forward or make him show the specific testimony which the witness would give if he were here, unless there be some reason to doubt the good faith of the application or the materiality of the witness, supposing him to be here.

The managers have produced a book, The Trials of Smith and Ogden. There the counsel for the accused asked for the continuance of the cause until they should be able to get certain witnesses from Washington, to which it was objected that they had not stated what specific facts the witnesses would prove if they were present in court. Mr. Colden, of counsel for the defense, answered:

"That is not the law as we have hitherto understood it. If we are obliged to offer an affidavit, we conceive it to be sufficient, in the first instance, to declare generally that the witnesses are material without specifying the particular points to which they are to testify, and that without them our client can not safely proceed to trial."

To which the answer of the judge was this:

"You must offer an affidavit, and must show in what respect the witnesses are material."

Now mark the reason upon which that ruling was founded:

"The facts charged in the indictment took place, and are laid, in New York; the witnesses are admitted to have been during that period at Washington. The presumption is therefore that they can not be material, and this presumption must be removed by affidavit."

That is the rule. If we were asking for a postponement on account of a witness who manifestly was a thousand miles off at the time the fact which we wished to examine him upon occurred, that would raise such a presumption against us that the court would very properly call upon us to show how that witness could be a material witness. They have cited this book as a precedent, and, so far as I have read it, it is a sound precedent. Let them follow it up.

At the conclusion of the arguments, Mr. Roscoe Conkling, of New York, proposed this order, which was agreed to without division:

Ordered, That the Senate will receive any evidence otherwise competent which the counsel for the respondent assure the Senate will be connected with the case by the testimony of the witness Evans, now absent, but whom the respondent duly asked to have summoned and who is expected to appear.

Later, during the same day,[1] Mr. Carpenter announced:

Now, Mr. President, we have completed all the testimony that in our opinion as counsel we can properly and safely introduce until Mr. Evans is sworn. We now repeat the request that the court adjourn for a reasonable time to enable Mr. Evans to be present.

Mr. Manager McMahon said:

We certainly renew our objections, Mr. President, to a continuance without a compliance with the rule, or, if not the rule, a rule that ought to be established by the Senate, that the materiality or pertinency of the testimony expected be submitted to the Senate. The question has been argued.

Soon after Mr. Carpenter asked leave to file this affidavit in support of their motion:

United States Senate sitting as a court of impeachment

The United States
v.
William W. Belknap

District of Columbia, *ss:*

W. W. Belknap, being first duly sworn, on oath says that he has stated to his counsel, Hon. J. S. Black, Montgomery Blair, and Matt. H. Carpenter, what he expects to prove by John S. Evans, and

[1] Senate Journal, pp. 978–981; Record of trial, pp. 269–273.

after such statement is advised by his said counsel, and verily believes, that the testimony of said Evans is material and necessary for his defense in this cause, the said Evans being the same person upon whose appointment the articles of impeachment are based; that said affiant is informed and believes that said Evans is en route for Washington and detained by high water obstructing the roads, but that he will be in as soon as he can get here, and this application for postponement of the trial is made in good faith, and not for delay.

WM. W. BELKNAP.

Subscribed and sworn to before me this 12th day of July, A. D. 1876.

W. J. MCDONALD,
Chief Clerk Senate.

Mr. Manager McMahon said:

The objection has been fully stated, and we only rise now to enter it formally here.

In support of the objection Mr. Manager Elbridge G. Lapham said:

The respondent entered upon the trial without objection, upon the assumption that he was ready for trial. We are now in the midst of the trial; and a different rule, I submit, applies to this case from what would have been applicable if this application to postpone had been made before the trial commenced, upon the ground that Evans was not here in attendance. We have waited until the evidence on our side is completed, with the right to call this witness in case he comes, for we want him, I apprehend, much more than the defense. We have waited until the defense have exhausted in the main their evidence, according to the suggestion of the counsel. Now they propose to stop this trial midway, and postpone the further hearing by reason of the absence of this witness, without any suggestion as to what they propose to prove in respect to this case by him. I submit that an application now, pending the trial, is upon an entirely different footing from an application made before the trial is entered upon on the supposition and statement that the party is not ready for trial and can not properly commence it. The defendant did not ask to postpone this case on the ground that his witnesses were not here. He entered upon the trial on the 6th of the present month, the day assigned by the Senate for the trial, without objection that he was not prepared to go through with it. It was then the proper time, if his witnesses were not here, for him to have asked a postponement until their arrival. Having entered upon the trial, and having proceeded to the point we now have reached, I submit that the application to postpone is upon a different footing from what it would have been if made then.

Mr. Carpenter replied:

Mr. President, the reason for strictness against an application made to adjourn a cause after the trial of it has commenced in a court of law is that a jury is not a continuing institution. It is summoned for a term, and it never comes again. That particular body never comes a second time. That is the reason, and it is always stated so, why greater strictness is observed in regard to the postponement of a trial commenced before a jury. Everything that has been done must he lost. The testimony at the next term must be retaken, and the whole case proceed de novo. Here is a trial in the court of impeachment before the Senate of the United States, a body that can not die as long as the Government lives, a continuous institution, that is not to lose the benefit of what has been done. The strict attention which has been paid by every Senator here to this testimony shows that it will never fade from his recollection. There is not the slightest fear that when the Senate shall postpone this hearing for a week or ten days to have this witness arrive any of the testimony will be even faintly fading away at all in the minds of the Senate. The argument, therefore, made by the managers as to a nisi prius trial before a jury has no application.

Again, he says we ought to have applied for a continuance before we commenced the trial. I have already stated to the Senate, and now repeat, that when we made our application to have this witness subpoenaed he was not subpoenaed in our behalf, because the Government had subpoenaed him themselves. The Government were here with their case, and Mr. Evans was one of their witnesses, and we have heard from first to last that he was one of their main and principal witnesses, the thought of whose absence makes their grief overflow. We had no doubt that the managers were acting in good faith. We had no doubt that they would not proceed to the trial until they knew their chief witnesses were at command.

Mr. Carpenter then presented this request:

The respondent's counsel ask for an order that the further trial of this cause be postponed until notice be given by the Senate to the House of Representatives of the United States and to the respondent.

Pending consideration of this application, the Senate sitting for the trial adjourned.

On July 13 the President pro tempore laid before the Senate a communication from the Sergeant-at-Arms of the Senate describing the efforts made to secure the attendance of the witness, and stating that the latter had started for Washington, but had been detained by bad roads.

Mr. Thomas F. Bayard, a Senator from Delaware, having propounded to counsel for the respondent a question which had not been answered, proposed the following:

That as a condition precedent to the order for postponement of this trial asked for on the 12th instant by the respondent it is

Ordered, That the respondent inform the Senate what in substance he proposes to prove by John S. Evans, the witness on the ground of whose absence postponement is asked.

Mr. Carpenter then said:

Mr. President and Senators, I desire in the first place to enter a respectful protest against being compelled in a criminal case to state what we expect to prove by a witness. I do that, not for its importance in this case so much as I hold that every lawyer defending a person accused in any court owes it to his profession to stand by the regular practice, and I understand that to be the regular practice almost without exception, that where a defendant in a criminal case is not in fault as to the subpoenaing of a witness he is not compellable to state what he expects to prove by that witness.

In this case, however, one or two things I may state. In the first place, we expect to prove by Mr. Evans one reason why he was not appointed when he first applied for this position, and that was that he intended to form a partnership with Durfee * * * and that that was one important reason why he was not appointed at first.

In the next place, let me say that Mr. Evans is the man upon whose appointment these articles rest. We have never examined him nor had an opportunity to do so. He has sworn twice before a committee of the House, and the testimony presented by the managers is quite voluminous in manuscript. We have never read it; at least I have never read it; and I never supposed we should be called upon to read it, because we had the assurance of the Government that Mr. Evans was to be here. It seems now, from the statement of the Sergeant-at-Arms, that Mr. Evans was here and was released temporarily by the managers themselves without consultation with us. Our witness has been subpoenaed by the order of the Senate, has been here, has been discharged or released temporarily by the opposite party without consultation with us, and we desire to call and examine him.

Now we are asked, "Will you state what you expect to prove by him?" We can not, because we do not know what he will swear to in regard to certain points. And, sir, in a trial like this where every word we utter goes upon the record to be called back in the summing up of this case to show that we were mistaken about what the witness would swear, we should be guarded and prudent. We know this man Evans has had intimate knowledge of the management of that tradership from first to last, for he has been the trader. We know from glancing through certain other testimony and from certain other facts within our knowledge that he must have knowledge of certain subjects which we think if he would swear one way will be important to us; if he would swear the other way it might not be so beneficial to us. We think he will swear in our favor; and yet we do not know what he will swear; and therefore we do not know what we expect to prove by him.

The Senate, without further action on the application, adjourned.

On July 14 the Senate sitting for the trial adjourned to Monday, the 17th, the following order being made:

Ordered, That when the Senate sitting for the trial of impeachment adjourns it be till Monday next, and that the trial then proceed.

On Monday, the witness not having arrived, Mr. George F. Edmunds, a Senator from Vermont, proposed this order:

Ordered, That the respondent have leave to examine John S. Evans at any stage of the proceedings prior to the termination of the argument-in-chief to any matter material to his defense.

But on motion of Mr. William Pinkney Whyte, of Maryland, it was

Ordered, That the Senate sitting in this trial adjourn until Wednesday, the l9th instant.

On Wednesday Mr. Evans was present, and was sworn.

2158. The Senate sitting on impeachment trials is empowered by rule to compel the attendance of witnesses.

The Senate sitting on impeachment trials has authority to enforce obedience to its orders, writs, judgments, etc., punish contempts, and make lawful orders and rules.

The Sergeant-at-Arms is authorized by rule to employ necessary aid to enforce the lawful orders, writs, etc., of the Senate sitting on impeachment trials.

Discussion as to the power of the Senate sitting on impeachment trials to command assistance of the military, naval, or civil service of the United States.

Discussion as to the power of the Senate sitting on impeachments to enforce its final judgment.

Present form and history of Rule VI of the Senate sitting for impeachment trials.

Rule VI of the "Rules of procedure and practice in the Senate when sitting on impeachment trials" is as follows:

VI. The Senate shall have power to compel the attendance of witnesses, to enforce obedience to its orders, mandates, writs, precepts, and judgments, to preserve order, and to punish in a summary way contempts of, and disobedience to, its authority, orders, mandates, writs, precepts, or judgments, and to make all lawful orders, rules, and regulations which it may deem essential or conducive to the ends of justice. And the Sergeant-at-Arms, under the direction of the Senate, may employ such aid and assistance as may be necessary to enforce, execute, and carry into effect the lawful orders, mandates, writs, and precepts of the Senate.

This rule dates from the revision made in 1868, at the time of the impeachment proceedings against President Johnson. The committee, of which Mr. Jacob M. Howard, of Michigan, was chairman, reported [1] the rule in this form:

VI. The court shall have power to compel the attendance of witnesses, to enforce obedience to its orders, mandates, writs, precepts, and judgments, to preserve order, and to punish in a summary way contempts of and disobedience to its authority, orders, mandates, writs, precepts, or judgments, and to make all lawful orders, rules, and regulations which it may deem essential or conducive to the ends of justice. And the presiding officer may, by the direction of the court, require the aid and assistance of any officer or person in the military, naval, or civil service of the United States, to enforce, execute, and carry into effect the lawful orders, mandates, writs, precepts, and judgments of said court.

The Senate having come to a conclusion which caused the word "court" to be discarded, the word "Senate" was substituted.[2] Before that was done, however,

[1] Second session Fortieth Congress, Senate Report No. 59.

[2] Globe, p. 1602.

another question had been presented by the motion of Mr. Willard Saulsbury, of Delaware, who moved to strike out the lines—

And the Presiding Officer may, by the direction of the court, require the aid and assistance of any officer or person in the military, naval, or civil service of the United States, to enforce, execute, and carry into effect the lawful orders, mandates, writs, precepts, and judgments of said court.

Debate arose on this motion,[1] involving two points-one as to the power of the Senate to command such assistance for its incidental or interlocutory judgments, and the other as to the power to enforce by such means, or by any means, its final judgment.

In support of his motion Mr. Saulsbury said:

My reason for making this motion is that, in my judgment, it is not in the constitutional power of the Senate of the United States, when acting in the discharge of its ordinary duties or as a court, to command the services of the Army and Navy or of any officer of the Army and Navy; that if it is proper to clothe the court with such a power it is necessary to pass an act of Congress giving them the authority, if such an act itself could be constitutionally passed. Suppose that this provision of this article remained, and the court called upon the officers of the Army and Navy to assist the court in the discharge of its duties, and they should assist them either as officers or in company with men under their command, what power would the court have to compel their attendance and their assistance? They are already under the command, in the first instance, of the General of the Army, and, secondly and chiefly, under that of the President of the United States.

How, therefore, can the Senate, acting as a Senate, command the services of the Army and Navy or the officers of the Army and Navy? Suppose they refuse to obey the order of the court made upon them for any attendance or to assist the court, how can you enforce that order? I submit, Mr. President, if their services can be invoked by any agency whatever, it can only be done after the passage of an act by the two Houses of Congress; that the court then would be acting in pursuance of law; but that the orders of this body, this Senate, are not law, and that the words, if they remain, will be a nullity and inoperative.

Mr. George H. Williams, of Oregon, said:

Assuming that the Senate, when it proceeds to try an impeachment, is a court, I suppose it possesses those powers as to the execution of its judgments that other courts possess—no other or greater powers. I do not suppose that it can be contended that the Senate can make a rule which will have the force of law. True, the Senate may provide for its own government in the transaction of any particular kind of business; but I do not understand that the Senate can make a rule that will operate upon persons outside of the Senate, or that will operate like a legislative act.

Assuming, then, that the Senate, in making these rules, is confined to the creation of orders that regulate its own actions, it seems to me to follow necessarily that the court has no power by the use of military force to execute its judgment. Take any court; if you please, the supreme court of the District of Columbia. Suppose a judgment is rendered by that court; it becomes the duty of the ministerial officer, the marshal or the sheriff, to execute that judgment. If resistance is made to the process in his hands, then he may summon the posse comitatus for the purpose of executing that process; and if the resistance is so strong as to defeat his proceedings, under such circumstances, if there be any law of the land which authorizes it, he may call upon the military to assist him in the execution of the process. But I submit that when judgment is rendered by the court the jurisdiction of the court is at an end, so far as enforcing its execution is concerned. Can the supreme court of the District of Columbia make an order and enter it upon its records that if any process of that court is resisted a military or naval force shall be employed in the execution of that process? * * * as to whether the court in session may make an order commanding the military or naval forces of the United States to do any act whatever, unless it may be to protect the court, to protect its dignity, to preserve decorum. That is an inherent power in the court. But can the court issue an order as a court and say to General Grant, "You marshal your army in such a place for such a purpose? Or can it issue an order to any admiral in the Navy to put his

[1] Senate Journal, pp. 238, 812; Globe, pp. 1526–1533.

armed vessels in any particular position for any purpose? It seems to me that, if there is no law on the subject, there ought to be a law providing for the enforcement of judgments that are rendered in cases of this kind. If there be no law, then such a law ought to be enacted; but because there is no law the Senate has no power to assume to create such a law and exercise legislative power. I do not desire to have the Senate in making these rules go beyond its jurisdiction, though I am in favor, of course, of all rules that are necessary to enable the Senate to transact its business. But it does seem to me that if in a case of impeachment that may be tried before the Senate a judgment of guilty should be pronounced by the court it can make no subsequent order for the execution of that judgment. If the person who is to be removed from office by that judgment refuses to obey that judgment, then legislation will be necessary or some other power must be interposed.

Mr. John Sherman, of Ohio, concurred with Mr. Williams if the rule was intended to enforce the final decree of the court. But he conceived that the rule was intended to apply only to what might be called the interlocutory orders of the court, to compel the attendance of witnesses, or judgments finding recalcitrant witnesses in contempt.

Mr. Reverdy Johnson, of Maryland, said:

I concur with the honorable Member from Delaware and the honorable Member from Oregon that we have no power to adopt the rule which we are asked to adopt. The rule which we are asked to adopt is one which, when proposed in the committee, of which I had the honor to be a member, I resisted, and I have seen no reason to change the opinion which led me to that course.

The authority conferred upon the Senate is to try all cases of impeachment, and the Constitution provides that when the President is the party impeached the Chief Justice is to preside; and the judgment which the Senate, acting as a court of impeachment, may pronounce can not extend beyond a declaration that the party impeached shall be removed from office and be thereafter ineligible to any other office of trust or profit under the United States. The "judgment shall not," in the language of the Constitution, "extend further than" that; and upon that judgment being rendered in the case of a President—we are to look at that as a case which is really now before us with reference to this question—the Vice-President, if we have one, is to become President; and if the Vice-President is himself the President and is himself the party impeached, the President pro tempore of the Senate is to become President. No process, therefore, is necessary to enforce that judgment to that extent. The moment it has been pronounced the incumbent who has been impeached ceases to be President, and the party next in succession becomes at once the President. When he is the President he has precisely the same authority that he who is elected President and who takes his office at the termination of the term of his predecessor has.

Mr. George F. Edmunds, of Vermont, argued:

I should be sorry to see us strip ourselves, by refusing to adopt a rule of this kind, of the power which that rule confers. It is a power which inheres in a body like this, as it does to the House of Commons and the House of Lords in England, from whence we derive our theory of trying impeachments. This rule only regulates and puts in force in the way of execution this existing power. We have to act as an organized body, whether sitting as a Senate or sitting as a court, because, as I said before, it is the same body exercising different functions, sitting for different purposes. Therefore, when the Constitution permits us to make rules and regulations for the government of the Senate, I think under the Constitution we can make a regulation for the government of the Senate when it is exercising any of the functions that the Constitution imposes upon it. Being of the opinion that this power to protect ourselves, and to enforce any order or mandate that the Constitution authorizes us to make, exists, while I agree that it ought to have the assistance of law in a great many respects, it being in my judgment an inherent power, we have a right to regulate and to name the cases in which it shall be put in exercise. As I have said before, if any question arises after we are sworn, and the Chief Justice takes the chair, as to the fact that the functions of the court are cramped by these general rules, it will be time enough then for the court to say that it will or will not (because it is the same body) change or execute them. Now, I should be sorry to see the Senate exercising the constitutional power of making rules and regulations in general, refuse to provide for putting in exercise a power of this kind, while I hope and believe it will not be necessary to make use of it; especially in view of the fact that it has been published to the

world in another place (using parliamentary language), by a distinguished leader, that our orders, processes, and mandates will be resisted. * * *

The Constitution says that we are to try and adjudge, and there the Constitution stops; and hence, upon the logic of that proposition, inasmuch as the Constitution does not provide how we are to get the Chief Justice in here in a certain case, or how we are to be sworn in a certain other case, the law providing no oath, the Constitution providing no oath, merely stating that we are to be sworn, we are perfectly helpless. In short, the argument is that the Constitution is not a code of procedure; that it does not contain a set of rules and regulations. Mr. President, that is a mistake. It is a mistaken idea of the nature of the Constitution, of the idea of conferring constitutional power. Wherever there is a grant of power by a law or by a constitution to a tribunal or a body or a person, there is granted in that power, as a part of it, there is conferred as in it and of it and a part of it all the power that is necessary, justly and properly necessary, to the due exercise of the power conferred. So the Supreme Court frequently decided in the days of Marshall; and I challenge contradiction upon the proposition. * * *

The Senate gives itself the power, without having an endless debate on the subject, to direct its Presiding Officer, when we have a justice of the Supreme Court on trial or any other man accused, to apply to the President of the United States and ask of him the assistance that is necessary to protect us in the exercise of our functions. It does not assume the legislative power of imposing any penalty if that President should refuse. There is the distinction. If we were desiring to get a witness into court who refused to come, and force were needed to bring him upon attachment, it would be necessary, if he should bring action against one of the assistants of the Sergeant-at-Arms, for that assistant to defend on the authority of the Senate, and to prove that it was by our authority that he assisted the Sergeant-at-Arms in bringing in the witness. Now, what does this rule provide? It provides for all such cases in advance, without having a squabble over them at the time. By it our authority is given in advance, by a mere order to that effect on a single point, to call upon everybody to assist in the enforcement of our process.

Now, as to the final process, if you speak of it as process—it is not so spoken of in the report; it is spoken of as a judgment—it is said that the word "judgment" may include the final judgment. The term "judgment," of course, does in its natural meaning include final judgments as well as interlocutory ones; but we must always construe language in reference to the subject to which it is to be applied. As applied to interlocutory judgments, we all seem to agree that it is proper. When you come to final judgment, although there is no express exception made, the nature of the final judgment has been well stated by the Senator from Ohio; it is a judgment the very force and operation of the pronouncing of which is to change the office, speaking in the case of a President, from one person to another; so that the judgment in a certain sense may be said to execute itself. Therefore, if you say the word includes final judgment, and you may in that literal sense, it does no harm, because all that then you would call upon anybody to do would be to call upon the new and lawful President of the United States to assist the Senate in putting himself into possession of his own office.

The motion of Mr. Saulsbury, to strike out, was agreed to, yeas 25, nays 15. Mr. Lyman Trumbull, of Illinois, said during the debate:

I will state that in the committee, as I was a member of it, I thought it better not to have this clause in, and I was in favor of the old rules as far as they could be made applicable to the present case. I thought the fewest changes made the best. Now, I submit to the Senate whether we shall not accomplish all we want by adopting the old rule on this point. I think the Senator from Indiana will be satisfied with that, and I think we ought all to be satisfied with it. The old rule provided that the Presiding Officer "shall also be authorized to direct the employment of the marshal of the District of Columbia, or any other person or persons during the trial, to discharge such duties as may be prescribed by him." The marshal has authority under the general laws to call a posse, if necessary, to call on the military if necessary. We have a marshal in the District of Columbia not acceptable I believe to everybody, but I think a marshal who will do his duty, whatever his duty is, as faithfully as anybody else. Why not strike out all of the words of this rule? After the word "court" strike out and insert what I have read, so as to read:

"The Presiding Officer may by the direction of the court direct the employment of the marshal of the District of Columbia, or any other person or persons, during the trial to discharge such duties as may be prescribed by him."

I think that would get us out of this difficulty.

Objection was made to this old rule—which dated from the trial of Judge Chase, in 1805—on the ground that the marshal of the District of Columbia had duties of his own prescribed by law, and might not be at the service of the Senate. There was discussion also as to his power, and the power of the Sergeant-at-Arms, to summon a posse comitatus to assist. Finally Mr. Trumbull's proposition was put in form as follows, and agreed to without division:

And the Sergeant-at-Arms, under the discretion of the court, may employ such aid and assistance as may be necessary to enforce, execute, and carry into effect the lawful orders, mandates, writs, and precepts of said court.

Subsequently, in accordance with the general principle agreed on, the final words "said court" were stricken out, and the "Senate" inserted.

So the rule was finally agreed to in the form in which it now exists.

2159. The Senate, sitting for the Belknap trial, declined to order process to compel the attendance of a witness who had been subpoenaed by telegraph merely.—On July 10, 1876,[1] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Matt. H. Carpenter, of counsel for the respondent, asked for an attachment to compel the attendance as a witness of John S. Evans. Mr. Carpenter stated that Evans had been subpoenaed, but had not appeared. The following return was read:

WASHINGTON, D. C., *July 1, 1876.*

I made service of the within subpoena, telegraphing the same to the within-named John S. Evans, at Fort Sill, Ind. T., on the evening of the 22d day of June, 1876.

JOHN R. FRENCH,
Sergeant-at-Arms United States Senate.

Mr. Manager John A. McMahon also said:

I will state in addition that I have seen a dispatch in the Sergeant-at-Arms's room from John S. Evans acknowledging the receipt of this subpoena.

It was then

Ordered, That an attachment issue for the said John S. Evans.

Presently Mr. George F. Edmunds, a Senator from Vermont, asked if there was proof that Evans had been served with the subpoena. It having been stated in reply that the proof being by telegraph, Mr. Edmunds moved to reconsider the vote on the order, and the motion was agreed to.

Then a discussion arose, in the course of which it was developed that the subpoena for this witness, as well as for other witnesses living at a distance, had been served by telegraph.

Mr. John W. Stevenson, a Senator from Kentucky, said he was not aware of any law permitting a witness to be subpoenaed by telegraph, and expressed a doubt as to the legality of an attachment based on a subpoena thus served. Mr. Rocsoe Conkling, of New York, expressed the same doubt, and Mr. Edmunds said:

That is no service in point of law.

On motion of Mr. Edmunds the subject was laid on the table.

Then, on motion of Mr. Edmunds,

Ordered, That a subpoena issue commanding the said John S. Evans to appear forthwith before the Senate.

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[1] First session Forty-fourth Congress, Senate Journal, p. 969; Record of trial, pp. 226–228.

2160. The Senate sitting for an impeachment trial, has commanded a reluctant witness to produce certain papers in its presence.—On July 8, 1876,[1] in the Senate, sitting for the impeachment trial of William W. Belknap, late Secretary of War, Leonard Whitney was sworn and examined as a witness on behalf of the United States. The witness was manager for the Western Union Telegraph Company and had been subpoenaed to produce telegrams passing between Caleb P. Marsh and the respondent.

Mr. John A. McMahon, of the managers for the House of Representatives, said to the witness:

> Now open your package and see what dispatches you have from Washington to New York, passing between Mr. Marsh or R. G. Carey & Co. and W. W. Belknap.

The witness replied:

> Before I do so I wish to state that I can not produce these telegrams unless I am required to do so by the court; and I respectfully submit to the court that they are privileged communications, and I ought not to be required to produce them.

The President pro tempore[2] thereupon submitted the question to the Senate, Shall the witness produce the telegrams? and it was decided in the affirmative without division.

2161. In impeachment trials before the House of Lords it is the practice to swear and examine the witnesses in open house.

Under the parliamentary law witnesses in an impeachment trial may be examined by a committee.

In Chapter LIII of Jefferson's Manual the following is given in the "sketch of some of the principles and practices of England," on the subject of impeachments:

> Witnesses. The practice is to swear the witnesses in open house, and then examine them there; or a committee may be named who shall examine them in committee, either on interrogatories agreed on in the House or such as the committee in their discretion shall demand. (Seld. Jud., 120, 123.)

2162. Form of oath administered to witnesses in impeachment trials.

Form of subpoena issued to witnesses in impeachment trials.

In impeachment trials subpoenas are issued on application of managers or the respondent or his counsel.

Form of direction for service of subpoenas to witnesses in impeachment trials.

Discussion as to the competency of the Senate to empower one of its officers to administer oaths.

Present form and history of Rule XXIV[3] of the Senate sitting for impeachment trials.

Rule XXIV of the "rules of procedure and practice for the Senate when sitting in impeachment trials" provides:

> Witnesses shall be sworn in the following form, viz: "You, ———. do swear (or affirm, as the case may be) that the evidence you shall give in the case now pending between the United States and ——— shall be the truth, the whole truth, and nothing but the truth, so help your God." which oath shall be administered by the Secretary or any other duly authorized person.

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[1] First session Forty-fourth Congress, Record of trial, p. 216. The Senate Journal (p. 966) indicates that Mr. Matt. H. Carpenter, of counsel for the respondent, made the objection instead of the witness, but the verbatim account in the Record of trial seems conclusive.

[2] T. W. Ferry, of Michigan, President pro tempore.

[3] See also section 2080 of this volume for other portions of this rule.

FORM OF A SUBPOENA TO BE ISSUED ON THE APPLICATION OF THE MANAGERS OF THE IMPEACHMENT OR OF THE PARTY IMPEACHED OR OF HIS COUNSEL.

To ——— ——— greeting:

You and each of you are hereby commanded to appear before the Senate of the United States, on the——day of ——, at the Senate Chamber in the city of Washington, then and there to testify your knowledge in the cause which is before the Senate, in which the House of Representatives have impeached ——— ———.

Fail not.

Witness ——— ———, and Presiding Officer of the Senate, at the city of Washington, this —— day of ———, in the year of our Lord ———, ——— ———,and of the Independence ——— of the United States the ——

Presiding Officer of the Senate.

FORM OF DIRECTION FOR THE SERVICE OF SAID SUBPOENA.

The Senate of the United States to ——— ———, greeting:

You are hereby commanded to serve and return the within subpoena according to law.

Dated at Washington, this —— day of ——, in the year of our Lord , and of the Independence of the United States the

———— ———, *Secretary of the Senate.*

These forms were agreed to in 1868[1] on report from a committee of which Mr. Jacob M. Howard, of Michigan, was chairman. They were adopted, with slight variations of phraseology from the forms used in the impeachments of Blount and Chase, in 1797 and 1805. The words "high court of impeachment," which had been introduced in the forms as reported, were stricken out in accordance with a general conclusion of the Senate as to its functions.

As reported, the rule provided simply that the oath to witnesses should be administered by the Secretary. The words "or any other person duly authorized" were added on motion of Mr. Roscoe Conkling, of New York. A difference of opinion had arisen as to the power of the Senate to confer on anyone the authority to administer an oath.

Mr. John Sherman, of Ohio, argued[2] that it could only be done by law, because if perjury should arise, the oath must be shown to be administered by an officer authorized by law to administer an oath. The Secretary had power to do so. Mr. Howard held that the Senate had the power, as belonging to its judicial function in trying the case, to provide for the administration of the oath.

2163. In impeachments a Senator called as a witness is sworn and testifies standing in his place.

Present form and history of Rule XVII of the Senate in impeachment trials.

Rule XVII of the "rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

If a Senator is called as a witness, he shall be sworn, and give his testimony standing in his place.

This rule dates from 1797,[3] when it was adopted for the trial of William Blount. In 1805,[4] at the time of the trial of Judge Chase, it received verbal changes merely.

[1] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, pp. 244–246; Globe, pp. 1590–1593.

[2] Globe, p. 1593.

[3] First session Fifth Congress, Senate Journal, p. 566; Annals, p. 2197.

[4] Second session Eighth Congress, Senate Journal, pp. 511–513; Annual , pp. 89–92.

2164. During the Belknap trial Senators were called as witnesses and were sworn, and testified standing in their places.—On July 12, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Matt. H. Carpenter, of counsel for the respondent, said:

Mr. President, I desire to call Senator Allison, of Iowa.

The President pro tempore I said:

The Senator will stand in his place and be sworn.

Hon. William B. Allison was sworn and examined, standing in his place. Similarly, George G. Wright, a Senator, was called, sworn, and examined.

2165. In an impeachment trial testimony is presented generally and is not classified according to the article to which it applies.—On February 11, 1805,[3] in the high court of impeachments during the trial of the case of the United States *v.* Samuel Chase, an associate justice of the Supreme Court of the United States, a witness was called, in behalf of the managers, when Mr. Robert G. Harper, counsel for the respondent, stated that this witness was called on an article subsequent to that on which the witnesses already examined had testified. He would submit a proposition to the honorable managers to go through at one time the whole of the testimony on each article. It might not be the regular course, but if gentlemen assent to it, said Mr. Harper, we shall prefer it; it will be convenient to the witnesses, many of whom may be discharged before the whole of the testimony is gone through.

Mr. John Randolph, jr., of Virginia, chairman of the managers, said:

Though this mode may have its advantages, it is attended with its difficulties. A witness may be found to support more than one article. With regard to the first article, I have no objection to this course; but with regard to the subsequent articles I have.

The President[4] said:

If the gentlemen are agreed, I will take the sense of the Senate on the course to be pursued.

Mr. Randolph said:

It is the wish of the managers not to depart from the usual course.

Mr. Harper said:

We do not claim it as a right.

2166. In the Johnson trial the Chief Justice held that evidence might be introduced during final arguments only by order of the Senate.—On April 20, 1868,[5] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, after the testimony had been nearly closed on both sides, Mr. Manager John A. Bingham suggested that it might be the desire of the managers later to examine one or more witnesses. This caused a discussion as to the admission of testimony after the beginning of the final arguments. Mr. Reverdy Johnson, a Senator from Maryland, expressed the opinion that such a course would

[1] First session Forty-fourth Congress, Senate Journal, p. 977; Record of trial, p. 267.

[2] T. W. Ferry, of Michigan, President pro tempore.

[3] Second session Eighth Congress, Annals, p. 193.

[4] Aaron Burr, of New York, Vice-President, and President of the Senate.

[5] Second session Fortieth Congress, Globe supplement, p. 239.

not be in accordance with the American practice. Mr. Manager Bingham suggested that it had been done in the trial of Judge Chase, although he could not speak positively.

The Chief Justice [1] said:

In case the honorable managers desire to put in further evidence after the argument it will be necessary to obtain an order of the Senate; at least it would be proper to obtain such order before the argument proceeds.

2167. The proposition that evidence in an impeachment trial may be admitted or excluded by a majority vote has not been questioned seriously.—On July 21, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Jeremiah S. Black, of counsel for the respondent, was making his argument in the final summing up, and was holding that, as two-thirds of the Senate were required to convict, so also two-thirds were required on a vote determining jurisdiction.

Mr. Allen G. Thurman, a Senator from Ohio, propounded this question:

If it requires two-thirds of the Senators present to overrule the respondent's plea to the jurisdiction, does it not follow that two-thirds are necessary to overrule any objections to testimony made by the respondent or to sustain an objection to testimony made by the managers?

Mr. Black replied:

No; clearly not. I admit that is a very fair attempt at the reductio ad absurdum of our proposition, but it does not succeed. What I say is that two-thirds are required to establish any fact which is an essential element in the conviction. Every other fact may be established and every other order may be made by a bare majority. I do not say that, because this is a court of impeachment and two-thirds of the Senate are required to concur in a final conviction, therefore every time an adjournment is moved it can not succeed without a majority of two-thirds.[3]

2168. Witnesses in an impeachment trial are examined by one person on either side.

Present form and history of Rule XVI of the Senate sitting for impeachments.

Rule XVI of the "Rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

Witnesses shall be examined by one person on behalf of the party producing them, and then cross-examined by one person on the other side.

This rule was first drafted in 1805 [4] for the trial of Judge Chase. In the revision of 1868,[5] preparatory to the trial of President Johnson, it was amended by striking out the words "cross-examined in the usual form," and inserting "cross-examined by one person on the other side."

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[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] First session Forty-fourth Congress, Record of trial, p. 315.

[3] During the trial of President Johnson a suggestion was made by Mr. Garrett Davis, of Kentucky, that the two-thirds rule should prevail as to ruling questions of evidence or law against the respondent, and he introduced an order to that effect; but it was not acted on. Second session Fortieth Congress, Senate Journal, p. 382.

[4] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.

[5] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, p. 813; Globe, p. 1568.

2169. The managers in the Swayne trial having offered to prove a statement made by respondent before the House committee, counsel successfully resisted the reading of the statement as part of the offer.

An argument by counsel for respondent against the "offer of proof" method of presenting evidence in an impeachment trial.

Instance wherein counsel for respondent in the Swayne trial was called to order for language reflecting on the conduct of the managers.

On February 14, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager Henry W. Palmer, of Pennsylvania, offered to prove that the respondent on the 28th day of November, 1904, at the city of Washington, D.C., voluntarily appeared before a subcommittee of the House Judiciary Committee, not having been summoned as a witness or otherwise, and voluntarily made the following statement.

At this point Mr. John M. Thurston, of counsel for the respondent, objected to the reading of the statement, saying:

Mr. President, standing here as objecting to this offer, I repeat what I said a few days since about this attempt to present to this court the statements made by Judge Swayne while he was a witness before a committee of the House of Representatives. The offer to prove what he said before that committee is all that, under any rule of practice that has ever prevailed in any court, can be made. It has never been held that in offering to prove what a witness had said somewhere else a statement could be made in the offer of what he had said somewhere else, because that would, by indirection and by pettifogging, Mr. President, present to the court, the judge, or the jury the statement of what the evidence would show when it was really admitted, if at all, and evidently in the expectation——

At this point Mr. Edmund W. Pettus, of Alabama, intervened and said:

Mr. President, I object to the word "pettifogging" being used in this court.

The Presiding Officer[2] said:

The Presiding Officer thinks that the word ought not to have been used.

Mr. Thurston then continued:

I apologize for the use of that word. I was not using it with reference to this offer. I was saying that it was a common custom in some courts to attempt to show by a statement of this kind what a witness had said somewhere else, when the attorneys making the offer knew and understood perfectly well that the statement itself would not be proper evidence to be introduced in the case, and that an offer of this kind was and is an attempt to present to a court evidence known to be improper, prohibited by the statutes of the United States, and its reading to the court in an offer must necessarily be, and can only be, an attempt by indirection to place in the record and before the judges testimony that they know is not legal testimony and ought not to be considered.

Now, Mr. President, I do not wish to reflect—and if I have made any reflections upon these honorable managers I withdraw them—I do not wish to reflect upon them in this case, but I do say that in other cases and in other courts where offers of this kind have been made they have been necessarily made with the express desire to place in the record and before the court and the jury a line of evidence that is prohibited by the law of the land from being presented. We object both to the offer to introduce the testimony and to the offer to read the proposed testimony to this court. Mr. President, we also protest against this manner of presenting evidence by an offer to prove something.

The only proper way, in our judgment, if the managers wish to produce this testimony and have this court pass upon its competency, is to put a witness on the stand or to offer the record, to ask the question,

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[1] Third session Fifty-eighth Congress, Record, pp. 2536, 2537.

[2] Orville H. Platt, of Connecticut, Presiding Officer.

or let the record be objected to, and pass upon that. I do not think it is proper for us, Mr. President—and the occasion may arise in this case where it would be most desirable for us, if it were proper—to offer to prove a certain statement of fact that we do not believe can be introduced in evidence if objected to upon the other side. But, sir, feeling our responsibility here, we will not attempt to offer before this court a statement of anything, nor will we attempt to offer in this court to prove facts setting it forth. What facts we have to prove we will prove by records, or we will prove them by questions directed to the witnesses presented in the court, and let the objections, if any there be, be taken in the regular way and upon legal lines.

Mr. Manager Palmer announced that he would hand the statement to the court and let the court pass upon it:

Mr. Joseph W. Bailey, of Texas, said:

Mr. President, while the Presiding Officer passes on such questions in the first instance, Senators must pass upon it finally, and they know what is offered before they can vote intelligently upon the question. It is unprecedented to say that the court shall not be permitted to hear what is offered before passing upon the admissibility of it. * * * for my own guidance, I would like to know exactly the question before the court.

The Presiding Officer said:

It is in writing. The managers offer to prove that the respondent on the 28th day of November, 1904, in the city of Washington, D.C., voluntarily appeared before a subcommittee of the House Judiciary Committee, not having been summoned as a witness or otherwise, and voluntarily made the following statement. Then the statement is recited.

No further demand was made for the reading of the statement, and it was not read.

2170. Managers and counsel disagreeing as to method of direct and cross examination of a delayed witness the Senate ordered examination in accordance with the regular practice.—On July 12, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, the managers announced:

We desire to state to the Senate that we are through with our case in chief for the United States with this exception, that if Mr. Evans arrives in the usual course of the trial of this case, we desire to put him on the stand, or if he is put upon the stand by the defense we desire permission to put to him such questions as would be competent and proper if he were examined by us in chief; but we do not ask the delay of this case one hour for the arrival of Mr. Evans. On the contrary, we ask that it proceed.

The President pro tempore said:

Is there objection to this privilege of examination being reserved?

Mr. Matt. H. Carpenter, of counsel for the respondent, objected.

On July 19[2] John S. Evans appeared, and was called as a witness on behalf of the respondent.

Mr. Carpenter said:

Mr. President, I desire to say to the managers that Mr. Evans is now upon the stand. If they wish to examine him as a witness on the part of the prosecution, we make no objection to their doing so. If they do not, we give them notice that we shall insist on their being held to a proper cross-examination.

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[1] First session Forty-fourth Congress, Record of trial, p. 255.

[2] Senate Journal, p. 981; Record of trial, p. 273.

Mr. Manager John A. McMahon said:

Mr. President, we desire to state to the Senate that we shall claim the right to call out on cross-examination whatever is legitimate and proper in this case. I think, after having waited for nearly a whole week for the witness to come to accommodate the defense, that the Senate will endeavor to expedite matters by enabling us to put our questions to the witness upon cross-examination with the full privilege of the gentlemen in rebutting to ask him to explain all those matters about which we may inquire, which will make one examination answer all the purposes of this case, whereas if we now examine him the gentlemen on their side will have a right only to cross-examine him as to what we examined into, and then they must put him on the stand, we cross-examine him, and so on, making really a double examination, and upon the good sense of the Senate on that question we rely now. The gentlemen may examine Mr. Evans.

Mr. Carpenter rejoined:

It will be recollected that the manager stated to the Senate that Mr. Evans was one of his most important witnesses. When he closed his case, he closed it reserving the right to call Mr. Evans if he should appear at any time during the trial. Mr. Evans is now present. We waive all objection to his being examined in chief on the part of the Government if they wish to examine him. If they do not, we shall insist, as far as we can insist, that when they come to the cross-examination they shall be restricted to the proper rules of cross-examination.

Thereupon, on motion of Mr. Roscoe Conkling, a Senator from New York, it was—

Ordered, That the managers proceed to examine the witness Evans in chief; or, should they decline to do so, the respondent may proceed to examine the witness in chief, with the right of the managers to cross-examine him like any other witness.

2171. The Senate prefers that managers and counsel, in examining witnesses in an impeachment trial, shall stand in the center aisle.—On February 15, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, it was directed that the managers in examining witnesses should stand in the center aisle of the Senate Chamber, near the rear row of seats, so that the answers of witnesses might be heard readily by the Senators.

Later, however, Mr. Anthony Higgins, of counsel for the respondent, urged that he must stand by the table in examining witnesses, as he needed to consult certain documents.

But generally managers and counsel stood in the central aisle when conducting the examinations.

2172. Witnesses in an impeachment trial give their testimony standing unless specially permitted to sit.—On February 14, 1905,[2] in the Senate sitting for the trial of Judge Charles Swayne, a witness, Joseph H. Durkee, had been sworn, when the Presiding Officer[3] said:

The witness asks that he may be allowed to be seated. He may sit if there is no objection. The witness will please raise his voice and answer all questions so as to be heard all over the Chamber.

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[1] Third session Fifty-eighth Congress, Record, pp. 2615, 2620.

[2] Third session Fifty-eighth Congress, Record, p. 2535.

[3] Orville H. Platt, of Connecticut, Presiding Officer.

2173. The Senate assigns the place to be occupied by witnesses testifying in an impeachment trial.—On July 6, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, the testimony was about to begin, when the President pro tempore[2] suggested that witnesses take a place at the right of the Chair, on a level with the Secretary's desk; but at the suggestion of the managers and several Senators a place on the floor in front of the Secretary's desk was assigned to the witnesses.

Later[3] Mr. Theodore F. Randolph, a Senator from New Jersey, said:

Mr. President, is there any objection on the part of the Senate and counsel to have the witness stand at your right or left? So far as I am concerned, it is utterly impossible for me to hear one word out of three that is spoken. It has been so during the whole time. If I take the seat of another Senator, it is at his inconvenience. This is my seat. I have no right to another, but I have a right to hear what is said.

The President pro tempore said:

The Chair will state to the Senator that he designated a little higher place for the witnesses, but the managers and counsel thought it would be preferable to have the witness in front of the desk, and the Chair submitted that to the Senate, and, as there was no objection, the witnesses were placed there.

Then the President pro tempore put the request to the Senate, and it was ordered that the witnesses stand on the right of the Chair on a level with the Secretary's desk.

2174. During the trial of Judge Chase one of the counsel for the respondent was sworn and examined as a witness.—On February 15, 1805,[4] in the high court of impeachments during the trial of the case of the United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, Luther Martin, one of the counsel for the respondent, was sworn and examined as a witness in behalf of the respondent.

2175. The order of taking testimony in an impeachment trial is sometimes waived by consent of both parties.—On February 16, 1905,[5] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. Manager David A. De Armond, of Missouri, said:

Mr. President, the witness Belden, of New Orleans, has not yet arrived, and with the exception of that one witness, so far as we know now, our case is complete, and we are willing that the respondent may go on with his testimony, with the privilege to us of calling General Belden when he arrives.

Mr. John M. Thurston, of counsel for the respondent, said:

Mr. President, this suggestion was made to me this morning by the managers, and we have no objection to their proposed arrangement, it being, as I understand, that they have closed their case in chief, except as to the testimony of Judge Belden, who is to be produced by them and examined upon his arrival. We make no objection to that request. We should like, however, that they place Judge Belden upon the stand as soon as he does arrive, in order that as far as possible we may have their entire case in before we present our own witnesses.

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[1] First session Forty-fourth Congress, Record of trial, p. 179.

[2] T. W. Ferry, of Michigan, President pro tempore.

[3] Record of trial, p. 182.

[4] Second session Eighth Congress, Senate Impeachment Journal, p. 520; Annals, p. 246.

[5] Third session Fifty-eighth Congress, Record, pp. 2719, 2720.

2176. A question put by a Senator to a witness in an impeachment trial is reduced to writing and put by the Presiding Officer.

All orders and motions, except to adjourn, are reduced to writing when offered by Senators in impeachment trials.

The Presiding Officer in an impeachment trial is the medium for putting questions to witnesses and motions and orders to the Senate.

Present form and history of Rule XVIII of the Senate sitting for impeachments.

Rule XVIII of the "Rules of procedure and practice for the Senate when sitting in impeachment trials" is as follows:

> If a Senator wishes a question to be put to a witness, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing, and put by the Presiding Officer.

This rule dates from the Chase trial in 1805.[1] In the revision of 1868,[2] preparatory to the trial of President Johnson, the form was modified by the insertion of the parenthetical clause and the use of the words "Presiding Officer" for "President."

2177. In defiance of Rule XVIII for impeachment trials, the Senate has established the practice that Senators may interrogate managers or counsel for respondent.

Instance of an appeal from a ruling of the President pro tempore in the Senate sitting for an impeachment trial.

While the Senate was sitting for the impeachment trial of William W. Belknap, late Secretary of War, arguments, continuing from May 4 to May 8, 1876, were offered by the managers on the part of the House of Representatives and the counsel for the respondent on the question of the jurisdiction of the Senate to try a citizen not in civil office at the time of the presentation of articles of impeachment. In the course of these arguments, members of the Senate frequently interrupted the managers and counsel for respondent with questions[3] relating to various points touched in the argument. These questions were generally presented in writing.

2178. On July 20, 1876,[4] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Manager William P. Lynde was submitting an argument in the final summing up of the case, when Mr. William W. Eaton, a Senator from Connecticut, interrupting, said:

> Mr. President, is it proper that I should ask the manager a question?

The President pro tempore[5] said:

> It has been so ruled by the Senate.

And thereafter, during the trial, both the managers and counsel for respondent were interrupted by questions.[6]

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[1] Second session Eighth Congress, Senate Journal, pp. 511–513; Annals, pp. 89–92.

[2] Second session Fortieth Congress, Senate Report No. 59; Senate Journal, pp. 813, 814; Globe, p. 1568.

[3] First session Forty-fourth Congress, Record of trial, pp. 33, 42, 43, 47, 60.

[4] First session Forty-fourth Congress, Record of trial, p. 296.

[5] T. W. Ferry, of Michigan, President pro tempore.

[6] Pages 297, 315 of Record of trial.

2179. On July 12, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. George F. Edmunds, a Senator from Vermont, following a custom that had existed during the trial, proposed a question to counsel for the respondent.

Mr. Roscoe Conkling, a Senator from New York, raised a question of order as to the right of a Senator to interrogate counsel.

The President pro tempore[2] said:

The Senator from New York calls the attention of the Chair to the fact that the rule does not authorize the questioning of counsel, but of witnesses. * * * The rule will be read.

"XVIII. If a Senator wishes a question to be put to a witness, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing and put by the Presiding Officer."

* * * The Chair will state that in administering the rule he would not feel authorized to permit a question to be put to the counsel or the managers, for the rule provides only for Senators to question witnesses, and not counsel or managers to be questioned by them. * * * The Senator from New York has stated the point of order, and the Chair simply holds that under the rule No. 18, and which is the only one bearing upon the subject and upon which he rules, the Chair sustains the point of order.

Mr. Edmunds appealed, and on the question, "Shall the decision of the Chair stand as the judgment of the Senate?" There appeared yeas 18, nays 21. So the Chair was overruled, and the question proposed by Mr. Edmund was put to counsel.

2180. Questions asked by Senators in an impeachment trial, whether of managers, counsel, or witnesses, must be in writing.—On July 11, 1876,[3] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, several Senators had addressed verbal questions to the managers and to counsel for the respondent. Mr. Roscoe Conkling, a Senator from New York, having called attention to the rule, which he condemned as absurd, the President pro tempore[2] said:

As the Senator from New York has alluded to the fact that the question was not put in writing, the Chair will say that it has not been done in order to facilitate business, and a moment ago one of the Senators was about to reduce a question to writing and the Senator from New York stated that the practice had been otherwise. * * *

The Chair to facilitate business has allowed questions to be put without being reduced to writing by their propounders.

Later, colloquies and objection having arisen, the President pro tempore ruled:

The Chair will enforce the rule. Colloquies must cease. Objection has been made, and the Chair must enforce the rule. He will state that on the part of Senators, to guard against any breach of the rules and unpleasantness, he will require all questions to be reduced to writing; and then certainly there can no debate. The counsel will proceed.

Mr. Richard J. Oglesby, a Senator from Illinois, asked:

Does the decision of the Chair, that no questions can be put hereafter without being reduced to writing, cover questions put by the court to one of the counsel?

The President pro tempore said:

It covers all questions put by members of the Senate. The rule does not require the questions on the part of the parties to be reduced to writing unless so required by the Chair or a Senator; but all questions put by members of the Senate the rule requires shall be put in writing.

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[1] First session Forty-fourth Congress, Senate Journal, pp. 976, 977; Record of trial, pp. 258, 259.

[2] T. W. Ferry, of Michigan, President pro tempore.

[3] First session Forty-fourth Congress, Record of trial, pp. 248, 249.

2181. On July 19, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary, of War, John S. Evans, a witness on behalf of the respondent, was on the stand, when Mr. Theodore F. Randolph, a Senator from New Jersey, proposed to ask orally a question. The suggestion being made that the question should be reduced to writing, Mr. Randolph urged that such had not been the practice.

The President pro tempore[2] said:

The Chair will observe at this time that so far as questions have been put to witnesses by Senators the rule in the recollection of the Chair has been observed until this time, and the Chair called the attention of the Senator from California, who put a question just now without reducing it to writing, to the fact that the rule required it to be done. The question having been put and it having been reduced to writing, by calling the attention of the Senator to the rule the Chair did his duty. Heretofore no questions have been put to witnesses, as the Chair recollects, without having been first reduced to writing.

2182. Chief Justice Chase finally held, in the Johnson trial, that the managers might object to a witness answering a question put by a Senator.—On April 13, 1868,[3] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman was examined as a witness, and Mr. Reverdy Johnson, a Senator from Maryland, presented in writing a question for the witness to answer.

To this question Mr. Manager John A. Bingham, in behalf of the House of Representatives, objected.

Mr. Garrett Davis, a Senator from Kentucky, thereupon raised the question that one of the managers had no right to object to a question propounded by a member of the court.

The Chief Justice[4] said:

When a member of the court propounds a question, it seems to the Chief Justice that it is clearly within the competency of the managers to object to the question being put and state the grounds for that objection, as a legal question. It is not competent for the managers to object to a member of the court asking a question; but after the question is asked, it seems to the Chief Justice that it is clearly competent for the managers to state their objections to the questions being answered.

2183. On April 13, 1868,[5] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman had been called as a witness on behalf of the respondent. In the course of the examination, Mr. Reverdy Johnson, a Senator from Maryland, propounded this question:

Did you at any time, and when, before the President gave the order for the removal of Mr. Stanton as Secretary of War, advise the President to appoint some other person in the place of Mr. Stanton?

Mr. Benjamin F. Butler, one of the managers for the House of Representatives, at once objected to the question as leading in form, and also as being incompetent according to the decisions of the Senate as to this line of inquiry.

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[1] First session Forty-fourth Congress, Record of trial, p. 275.

[2] T. W. Ferry, of Michigan, President pro tempore.

[3] Second session Fortieth Congress, Senate Journal, p. 894; Globe Supplement, pp. 169, 170.

[4] Salmon P. Chase, of Ohio, Chief Justice.

[5] Second session Fortieth Congress, Senate Journal, p. 892; Globe Supplement, p. 166.

Mr. Garrett Davis, a Senator from Kentucky, raised a question as to whether or not the managers or the counsel for the defense could interpose any objection to a question by a member of the court.

The Chief Justice [1] said:

The Chief Justice thinks that any objection to the putting of a question by a member of the court must come from the court itself.

Thereupon Mr. Charles D. Drake, a Senator from Missouri, objected to the question.

The Chief Justice said:

The only mode in which an objection to the question can be decided properly is to rule the question admissible or inadmissible; and that is for the Senate. The question of the Senator from Maryland has been proposed unquestionably in good faith, and it addresses itself to the witness in the first instance, and it is for the Senate to determine whether it shall be answered by the witness or not. Senators, the question is whether the question propounded by the Senator from Maryland is admissible.

And the question being taken, there appeared yeas 18, nays 32. So the question was excluded.

2184. Either managers or counsel in an impeachment trial may object to an answer to a question propounded to a witness by a Senator.—On February 11, 1905,[2] in the Senate sitting for the trial of Judge Charles Swayne, a witness A. H. D'Alemberte, was sworn and examined. In the course of the examination a Senator, Mr. Augustus O. Bacon, of Georgia, proposed this question:

Q. Does the law of Florida require the payment of a poll tax from each male citizen of the State who is over 21 and under 55 years of age, without reference to the question whether or not he votes?

Mr. Manager Henry W. Palmer, of Pennsylvania, objected, saying:

In the opinion of the managers, that is a question of law, not of fact. I suppose we have a right to object to a question by a Senator, under the rule, and we object to that question. It is a matter of law, and I do not suppose the witness is a lawyer.

The Presiding Officer [3] said:

If the objection is insisted upon, the Presiding Officer thinks that the question is improper, for the reason that it relates to a matter of law; but the Presiding Officer would suggest that this examination has so far proceeded upon questions of law very largely.

Mr. Henry Cabot Lodge, a Senator from Massachusetts, raised a question as to whether or not the managers might object to a question propounded by a Senator.

The Presiding Officer said:

Perhaps not in the technical way in which objections are made in court, but the Presiding Officer thinks that either the managers on the part of the House or the counsel for the respondent have a right to raise the question, to be decided by the Presiding Officer, as to whether evidence is admissible. * * * The Presiding Officer does not at this time desire to make any binding or irreversible rule, but if such a case can be supposed as that a Senator should put an improper or inadmissible question to a witness the Presiding Officer thinks that that question being raised he would have a right to rule upon it.

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[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] Third session Fifty-eighth Congress, Record, pp. 2393, 2397, 2399.

[3] Orville H. Platt, of Connecticut, Presiding Officer.

Later Mr. Manager Palmer said:

While the witness is coming I wish to submit to the President the authority on which I objected to the question asked by the Senator from Illinois [Mr. Hopkins]. It is a ruling made by Chief Justice Chase in the trial of Andrew Johnson, and is to be found in the second volume of the Congressional Globe, at pages 166, 169, and 170, where it was decided that the managers had a right to object to a question asked by a Senator.

I merely call attention to the authority to show that I was not objecting without some reason.

A little later Mr. Joseph B. Foraker, a Senator from Ohio, said:

I deem it my duty to call attention to the fact that on page 310 of Extracts from Journals of the Senate of the United States of America in Cases of Impeachment I find the following ruling by the Chief Justice.

Mr. Johnson, Senator, having asked a question, objection was made by the managers.

"Mr. Manager Bingham having commenced an argument in support of the objection,

"Mr. Davis raised the question of order that it was not in order for the managers to object to a question propounded by a Member of the Senate.

"The Chief Justice ruled that neither the managers nor the counsel had a right to object to a question being put by a Member of the Senate, but might discuss the admissibility of the evidence to be given in answer to such question."

The ruling by the Chief Justice was submitted to the Senate and was sustained by the Senate, the rule on that subject being Rule XVIII, Governing Impeachment Trials, which reads as follows:

"XVIII. If a Senator wishes a question to be put to a witness, or to offer a motion or order (except a motion to adjourn), it shall be reduced to writing, and put by the Presiding Officer."

In other words, the rule is without qualification; and this is the first time I ever heard it suggested that a court conducting a trial did not have a right to put any question the court might see fit to ask. If there be any ruling such as managers have stated there is, made by the Chief Justice in the course of that trial, I have overlooked it.

Later Mr. Manager Palmer said:

Mr. President, the managers have been asked for the particular authority for making objection to a question asked by a Senator. I refer the Senator from Ohio [Mr. Foraker] to the Congressional Globe, volume 40, trial of Andrew Johnson, page 169, in which the Chief Justice made this ruling. * * * The 13th of April, 1868, page 169. The ruling was as follows:

"The CHIEF JUSTICE. The honorable manager will wait one moment. When a member of the court propounds a question, it seems to the Chief Justice that it is clearly within the competency of the managers to object to the question being put and state the grounds for that objection as a legal question. It is not competent for the managers to object to a member of the court asking a question; but after the question is asked it seems to the Chief Justice that it is clearly competent for the managers to state their objections to the questions being answered.

The Presiding Officer said:

The manager will allow the Presiding Officer to refer to the ruling which was cited by Senator Foraker. It is in these words:

"The Chief Justice ruled that neither the managers nor the counsel had a right to object to a question being put by a Member of the Senate, but might discuss the admissibility of the evidence to be given in answer to such question."

The ruling seems to be that an objection can not be made to a Senator putting a question, but that the admissibility of the evidence to be given might be objected to and discussed.

Mr. Manager Palmer said:

That is right. That is what we understood. We objected to the admissibility of the answer to such a question, because we did not think it was a legal question.

The Presiding Officer continued:

That is what the Chair understood; not that the managers objected to a question being put by a Senator, but objected to the question being answered.

Mr. Manager Palmer added:

Yes; we objected to its being answered, not to its being asked.

2185. The Senate decided that it might, in an impeachment trial, permit a Senator to interrogate a witness, although both managers and counsel for the respondent objected.—On July 11, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness for the United States, had been examined by the managers, cross-examined by counsel for the respondent, and had responded to questions put by Members of the Senate. Thereupon Mr. John A. Logan, a Senator from Illinois, proposed another question.

Mr. Matt H. Carpenter, of counsel for the respondent, objected to the question, and Mr. Manager John A. McMahon, on the part of the House of Representatives, seconded the objection.

Mr. Allen G. Thurman, a Senator from Ohio, asked what business the court had to ask a question to which both parties objected.

Mr. Logan said:

I presume that members of the court here stand upon an equality, and that one has as good a right to ask a question as another, provided it is a proper question, couched in proper language. I asked a question a while ago of the witness what the understanding was between him and Mrs. Bower. I did not use the name, but that was it, and he gave the understanding, and in that answer he incidentally remarked that he had an understanding with the former Mrs. Belknap. The question was argued by the managers and counsel for the respondent; the vote was taken by yeas and nays, and the Senate voted that the question should be answered; and the witness did answer the question. In furtherance of that question, I have asked what the understanding was with the former Mrs. Belknap.

Mr. Thurman said:

The House of Representatives here is represented by its managers; the defendant is represented by his counsel; and when both sides agree as to what are the issues upon which they will put in evidence, I really do not see, with entire respect to the Senator from Illinois and every other Senator, that it is any part of the duty of the Senate which is to sit here as impartial judges to introduce a new line either of prosecution or of defense. I see no reason for it; and if the Senate has erred once, it is no reason why it should err again. If neither the managers on the part of the House nor the counsel for the defendant have seen fit to go into the arrangements, if there were any, between the witness and this deceased lady or this living lady, it is no business of ours to go into them. If it is necessary for the purposes of public justice that they should be gone into and the testimony would be legitimate, it is to be presumed that the House of Representatives, through its managers, would have asked us to hear the testimony. If it were necessary for the defense that the matter should be gone into, it is to be presumed that the counsel for the defense would have introduced it as a defense. It is not for us to supply any deficiency of the prosecution or to supply any deficiency of the defense.

Mr. Oliver P. Morton, of Indiana, said:

I simply want to state that I regard it as the absolute right of this court or any member of it, with the consent of his brother judges or a majority of them, to ask any question; and the idea that the court can be overruled by the counsel on either side agreeing that the question shall not be asked is something entirely new.

The Senate decided, by a vote of yeas 23, nays 17, that the question should be admitted.

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[1] First session Forty-fourth Congress, Senate Journal, p. 973; Record of trial, pp. 241, 242.

2186. Instance wherein both managers and counsel for respondent were permitted to object to questions proposed by Senators.—On April 18, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Alexander W. Randall, Postmaster-General, was sworn as a witness on behalf of the respondent. In the course of the examination, Mr. John Sherman, a Senator from Ohio, proposed in writing this question:

State if, after the 2d of March, 1867, the date of the passage of the tenure-of-office act, the question whether the Secretaries appointed by President Lincoln were included within the provisions of that act came before the Cabinet for discussion; and if so, what opinion was given on this question by members of the Cabinet to the President.

Mr. Manager John A. Bingham objected that the evidence sought to be obtained was incompetent under the decisions of the Senate already made.

The question being taken, there appeared in favor of admitting the testimony 20 yeas, and against 26 nays. So the testimony was not admitted.

2187. On July 11, 1876[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, had been examined and cross-examined, when Mr. John H. Mitchell, a Senator from Oregon, proposed in writing this question:

Q. Why did you send to W. W. Belknap, Secretary of War, the one-half of the various sums of money received by you from Evans at Fort Sill?

Mr. Matt H. Carpenter, of counsel for the respondent, objected, saying:

Mr. President, the celebrated Jeremiah Mason in the trial of a very important case once said, when a judge put a question to a witness, he being counsel for the defense, that if the question was put on the part of the plaintiff, he objected to it; if it was put on behalf of the defendant, he withdrew it. * * * The Government have gone through the examination of this witness; we have cross-examined him; the court has allowed them to go partially into a redirect examination, and they have concluded it. This question put by the managers now would certainly be objectionable, and I presume that we have the same right to object to a question put by the court that we would have if it were put by the managers. * * * They have had one redirect examination, the court overruling our objection to it, to give it to them. Now after this will this court permit the managers to return to that subject and open the examination of this witness? And if they will not permit the managers to do it, will the court do it themselves? If a question can not be objected to when put by one of the court which would be ruled out if put by the counsel, then this is a strange proceeding and we are in a singular situation. I say this of course with entire respect to the Senator who asks the question; but we must have a right to object to the question, and for the purpose of testing whether it is proper or improper, it must be considered as a question put by the managers, and put by the managers at this time, is there the slightest doubt that the Senate would rule it out?

The Senate, without division, determined that the question should be admitted.

The witness replied to it:

Simply because I felt like doing it. It gave me pleasure to do it. I sent him the money as a present always, gratuitously. That is the only reason I had.

Thereupon Mr. George F. Edmunds, a Senator from Vermont, asked:

I should like to ask the witness, in connection with his last answer, whether General Belknap knew, in advance of these remittances from time to time, how large the present was going to be that was to be sent?

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[1] Second session Fortieth Congress, Senate Journal, p. 913; Globe supplement, p. 238.

[2] First session Forty-fourth Congress, Senate Journal, p. 971; Record of trial, pp. 237, 238.

Mr. Carpenter said:

Mr. President, I object to that question upon the ground that one man can not swear what another man knows. It is physically and intellectually impossible. If he could say that he told Mr. Belknap a thing, if he could prove any fact, that fact may be proved; but could I be put on the stand to swear what the Senator from Vermont knows upon any subject? I should say he knows all about it, but any particular knowledge on a particular subject I could not be called to swear to. Nobody can.

Mr. Montgomery Blair, also of counsel for respondent, said:

Mr. President and Senators, there is another objection to this question that I hope the Senate will consider before voting that this question shall be admitted, and that is that this witness is a Government witness, and that the interrogatory of the Senator is to impeach the witness on the part of the prosecution. It implies that he has not stated the truth.

The question being submitted, the Senate, without division, decided that the interrogatory should be admitted.

2188. While managers or counsel may argue in objection to a question put to a witness by a Senator in an impeachment trial, the Senator may not reply.—On July 19, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, John S. Evans, post trader at Fort Sill, was called as a witness on behalf of the respondent. It was alleged that Evans had been appointed by respondent through improper influence by one Marsh, who had shared by the terms of a contract in Evans's profits and divided them with respondent.

Mr. Theodore F. Randolph, a Senator from New Jersey, proposed this question to witness:

The question is this: What amount of goods did Mr. Evans sell at Fort Sill during any one year pending this contract?

Mr. Matt. H. Carpenter, of counsel for respondent, objected:

The object of that question seems to be to show that he made an improvident contract with Marsh and paid him too much. I submit that that can have no materiality to this cue. If the managers trace $500 home to Belknap in the form of a bribe, it is just as complete a case as $50,000. If he paid him an unreasonable bribe, it is no worse than to pay ten cents.

Mr. Randolph said:

I am unfortunately placed to argue the question with the counsel—

The President pro tempore [2] said:

Debate is not in order. The question will be put.

Thereupon, without division, the Senate decided that the question should be admitted.

2189. Rule of the Senate in the Swayne trial permitting managers or counsel to offer motions or raise questions as to evidence and prescribing the manner thereof.—On January 27, 1905,[3] in the Senate sitting for the impeachment of Judge Charles Swayne, Mr. Henry W. Palmer, of Pennsylvania, of the managers for the House of Representatives, offered the following:

Ordered, That lists of witnesses be furnished the Sergeant-at-Arms by the managers and the respondent, who shall be subpoenaed by him to appear on the 10th day of February, at 1 o'clock p.m.

[1] First session Forty-fourth Congress, Record of trial, p. 275.

[2] T. W. Ferry, of Michigan, President pro tempore.

[3] Third session Fifty-eighth Congress, Record, pp. 1450, 1451.

Later Mr. Charles W. Fairbanks, a Senator from Indiana, said:

We understand that the order which the managers of the House have asked for can not properly be put by them, and I suppose it is the proper practice to regard the order offered as a request. I offer,upon the request of the managers of the House, for present consideration, the order which I send to the desk.

Later, after the Senate had resumed its legislative sessions, Mr. Joseph W. Bailey, of Texas, said:

Mr. President, a moment ago, when the Senate was sitting as a court, it was doubted if the managers on the part of the House are permitted under the rules to make a motion. My own opinion is that nobody but a Senator can make a motion to be voted on by the Senate, but it would be a most anomalous situation if an attorney in any kind of a court could not make motions before that court to be acted on by that court. And for my own guidance—I am sure that other Senators are in much the same frame of mind—I should like to have that question settled. If it would be proper, I should like to have the Judiciary Committee report, or if the Senate prefers, a special committee, what have been the practice and the precedents in that respect.

It was pointed out that the Senate already had appointed a select committee to examine such questions, and that they would consider this question.

On February 3[1] Mr. Augustus 0. Bacon, of Georgia, offered, and the Senate sitting for the trial agreed to, an order as follows:

Ordered, That in all matters relating to the procedure of the Senate sitting in the trial of the impeachment of Charles Swayne, judge of the district court of the United States in and for the northern district of Florida, whether as to form or otherwise the managers on the part of the House or the counsel representing the respondent may submit a request or application orally to the Presiding Officer, or, if required by him or requested by any Senator, shall submit the same in writing.

In all matters relating immediately to the trial, such as the admission, rejection, or striking out of evidence, or other questions usually arising in the trial of causes in courts of justice, if the managers or counsel for the respondent desire to make any application, request, or objection, the same shall be directly addressed to the Presiding Officer and not otherwise.

2190. During final argument in the Chase trial the managers claimed and obtained the right to introduce testimony to justify evidence of an impeached witness.—On February 25, 1805,[2] in the high court of impeachments, during the trial of the case of United States *v.* Samuel Chase, an associate justice of the Supreme Court of the United States, the testimony had been closed, the beginning on behalf of the managers in the final argument had been made, and two of the counsel for the respondent had submitted arguments, when Mr. John Randolph, Jr., of Virginia, chairman of the managers, moved the examination of Hugh Holmes, who would testify in corroboration of the testimony of John Heath, a witness for the managers, whose evidence had been attacked. Mr. Randolph explained that Mr. Holmes did not attend until the evidence for the managers had been concluded. Mr. Randolph further said:

I only state this circumstance in tenderness to the character of the witness, and that Mr. Holmes is ready to prove that, pending the trial of Callender, Mr. Heath did declare to him as having passed in his presence such a conversation as the witness has stated. It is not our wish to press his evidence, because we know that the evidence of a witness thus rebutted can establish nothing material to the prosecution. But we are ready, if the court and counsel for the respondent agree, to receive his testimony.

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[1] Record, p. 1819.

[2] Second session Eighth Congress, Senate Impeachment Journal, p. 523; Annals, p. 541.

Mr. Robert G. Harper, counsel for the respondent, said:

It is not for us to say how the honorable managers shall proceed in conducting this prosecution. We have no objection to Mr. Holmes being examined, and we feel perfectly indifferent whether Mr. Heath be abandoned or not. Should Mr. Holmes not be examined, I presume it will be understood that he was offered to support the declaration of Mr. Heath.

Mr. Randolph said it was not intended to abandon Mr. Heath.

Mr. Harper inquired how long Mr. Holmes had been in the city. If correctly informed he had been here three days, and if so, his testimony might have been adduced before the defense on the part of the respondent was made.

Mr. Randolph said the delay in offering Mr. Holmes to the court arose solely from an indisposition to interrupt the counsel for the defendant. The character of Mr. Holmes stood too high to be impeached. It was only when they heard the correctness of Mr. Heath's testimony questioned that the managers deemed it necessary to do that, for the not doing of which they had received the censure of the counsel for the respondent. Mr. Randolph then moved that Hugh Holmes should be sworn.

The President [1] said the reasons assigned for the admission of Mr. Holmes's testimony, so far as they arose from tenderness to the character of Mr. Heath, could have no weight with the court. The only question for them to decide was whether his testimony was or was not material.

Mr. Joseph H. Nicholson, of Maryland, one of the managers, said he held it to be the right of either party, at any stage of the trial, when the evidence of a witness was impeached, to justify it by the testimony of another witness. He asked the receiving, therefore, of Mr. Holmes's testimony as a matter of right, not of favor.

The yeas and nays were taken on examining Mr. Holmes, and were yeas 21, nays 11.

2191. Instance of a suggestion by the Presiding Officer in the Swayne trial as to the form of a question.—On February 20, 1905 [2] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness on behalf of the managers was questioned by Mr. Manager David A. De Armond, of Missouri:

Q. Now, then, as to the matter of that newspaper article. I understood you to say that you knew nothing whatever about it, and that you so stated during the hearing of these contempt proceedings?—A. Yes, sir.

Q. And that Mr. Davis made a similar statement concerning himself?—A. I heard it; yes, sir.

Q. In the court, during the contempt proceedings?—A. Yes, sir.

Q. I will ask you whether there was anything else offered in testimony by those supporting the complaint against you than these two matters?—A. Nothing whatever.

Q. Then I will ask you whether there was anything upon which testimony could have borne in the matter brought out against you?

Mr. John M. Thurston, of counsel for the respondent, objected to this question.

The Presiding Officer [3] said:

In that form the question is hardly admissible. * * * The witness might be asked if he supposed there was anything which was important which was overlooked.

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[1] Aaron Burr, of New York, Vice-President, and President of the Senate.

[2] Third session Fifty-eighth Congress, Record, pp. 2905, 2906.

[3] Orville H. Platt, of Connecticut, Presiding Officer.

2192. Decision as to the limits within which counsel in an impeachment trial may criticize a witness.—On February 18, 1805,[1] in the high court of impeachments, during the trial of the case of The United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, a witness, John Montgomery, was called and in the course of cross-examination Mr. Robert G. Harper, counsel for the respondent, said:

I will now proceed to show that Mr. Montgomery, in his strong anxiety to get Judge Chase impeached, has remembered things which nobody else remembers, and has heard things which nobody else heard.

Mr. John Randolph, Jr., of Virginia, chairman of the managers, said:

I will ask of this court whether the witnesses we have called are not under their protection?

The President said:

If the counsel, in the testimony they adduce, come up to what they state they can prove, they will not be subject to reproach; if they do not, they merit it.

Mr. Randolph said:

I have no objection to the counsel impugning the veracity of one witness by the evidence of another and descanting upon it, but I think they take an improper liberty when they undertake to say, before it is proved, that what is deposed by a witness never passed.

The President[2] said:

I understand the gentleman to say that he will prove by another witness that what has been deposed never did pass.

Mr. Harper said:

Precisely so, sir.

2193. In the Swayne trial the Presiding Officer generally ruled on questions of evidence instead of submitting them directly to the Senate.—On February 21, 1905,[3] in the Senate sitting for the impeachment trial of Judge Charles Swayne, the Presiding Officer submitted a question relating to the admissibility of evidence, to the Senate directly, without ruling himself. Generally, in the course of this trial the Presiding Officer ruled, and very rarely indeed was the judgment of the Senate asked. The cases wherein the Presiding Officer submitted the question at once to the Senate without ruling himself were rare, and exceptional. On February 23[4] occur several instances when the Presiding Officer submitted the decision at once to the Senate, and thereafter on the few succeeding days he submitted questions with more frequency.

2194. When the judgment of the Senate is asked after the Presiding Officer has ruled on a question of evidence, the form of question is, "Is the evidence admissible?"—On February 14, 1905,[5] in the Senate sitting for the impeachment trial of Judge Charles Swayne a question arose as to an offer of

[1] Second session Eighth Congress, Annals, p. 291.

[2] Aaron Burr, of New York, Vice-President, and President of the Senate.

[3] Third session Fifty-eighth Congress, Record, p. 2979.

[4] Record, pp. 3147, 3167.

[5] Third session Fifty-eighth Congress, Record, p. 2540.

evidence, and the judgment of the Senate was asked by Mr. Joseph W. Bailey, a Senator from Texas. The Presiding Officer said:

Objection was made to the introduction of certain evidence. The offer on the part of the managers of the House to prove what Judge Swayne stated before a committee of the House when he appeared voluntarily before that committee was objected to by counsel for the respondent. The Presiding Officer ruled that without inquiring technically whether it was testimony which Judge Swayne gave, or technically whether this was a criminal court, that the intention of the statute referred to was such as made it proper to exclude the testimony; and from that the Senator from Texas took an appeal.

Mr. Joseph B. Foraker, a Senator from Ohio, raised a question:

Mr. President, I submit it is not technically correct to call it an appeal. The rule provides that when the Chair has ruled, it may, if any Senator so requests, submit the question to the Senate. I understand this is simply a request that the question be submitted to the Senate. * * * The question submitted to the Senate should be whether or not the objection of counsel for the respondent shall be sustained. So an affirmative vote would sustain the objection.

Mr. Albert J. Hopkins, a Senator from Illinois, said:

Would not the form under that rule then be as to whether the decision of the Chair shall stand as the judgment of the court?

Mr. Shelby M. Cullom, a Senator from Illinois, said:

I desire to read a paragraph from the trial of the President of the United States years ago:

"The CHIEF JUSTICE. Senators, the Chief Justice is unable to determine the precise extent to which the Senate regards its own decisions as applicable. He has understood the decision to be that, for the purpose of showing intent, evidence may be given of conversation, with the President at or near the time of the transaction. It is said that this evidence is distinguishable from that which has been already introduced. The Chief Justice is not able to distinguish it, but he will submit directly to the Senate the question whether it is admissible or not."

The Presiding Officer [1] said:

This is the rule:

"And the presiding officer on the trial may rule [on] all questions of evidence and incidental questions, which ruling shall stand as the judgment of the Senate, unless some Member of the Senate shall ask that a formal vote be taken thereon, in which case it shall be submitted to the Senate for decision; or he may, at his option, in the first instance, submit any such question to a vote of the Members of the Senate."

The presiding officer was of opinion that the question was whether the evidence was admissible. * * * The presiding officer then submits to the Senate the question whether the evidence offered by the managers on the part of the House is admissible.

2195. The right to ask a decision of the Senate after the Presiding Officer has ruled preliminarily on evidence belongs to a Senator, but not to counsel.—On July 7, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, a question by counsel for the respondent to a witness was objected to by Mr. Manager John A. McMahon.

The President pro tempore [3] said:

The Chair sustains the objection.

Mr. Matt. H. Carpenter, of counsel for respondent, asked if he might appeal to the Senate.

The President pro tempore [3] held that he might not, but said that a Senator might have the point submitted to the Senate.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] First session Forty-fourth Congress, Record of trial, p. 192.

[3] T. W. Ferry, of Michigan, President pro tempore.

2196. The Senate finally decided in the Swayne trial that under the rule debate on the admission of evidence might not take place in open Senate.—On February 14, 1905,[1] in the Senate sitting for the impeachment trial of Judge Charles Swayne, the decision of the Senate was asked on a question relating to the admissibility of evidence. Mr. Joseph W. Bailey, a Senator from Texas, proposed to debate the question, when a question as to debate arose, and the Presiding Officer[2] said:

In the opinion of the Presiding Officer, the matter can be discussed in the Senate upon the appeal and the vote be taken here, or the Senate can, if it so desires, retire to its conference chamber for discussion. Either course may be pursued, according to the wish of the Senate.

After Mr. Bailey had proceeded in debate for some time, Mr. Augustus O. Bacon, a Senator from Georgia, cited Rules VII and XXIII, saying:

The rule is peremptory that except when the doors are closed there must be no debate, short or long. * * * I read Rule VII to show that Rule XXIII does not in any manner modify the provision of Rule VII as to debate except when the Senate is in secret session; "when the doors shall have been closed," in the language of the rule. I do not think that debate upon any question which may arise is in order. Senators will perceive necessarily that a contrary rule would in its operations protract the session of a court of impeachment beyond the possibility of any practical termination.

The Presiding Officer said:

The Presiding Officer is of opinion that the point of order taken by the Senator from Georgia is well taken, and that the only exception is that contained in Rule VII. Rule XXIII provides:

"All orders and decisions shall be made and had by yeas and nays, which shall be entered on the record, and without debate, subject, however, to the operation of Rule VII, except when the doors shall be closed for deliberation."

The exception in Rule VII is that upon all such questions the vote shall be without a division. But Rule XXIII provides that all orders and decisions shall be by yeas and nays. The exception referred to in Rule VII is upon questions relating to the introduction of evidence and incidental questions; if the vote of the Senate is asked, it may be decided without a division, unless the yeas and nays are demanded.

The Presiding Officer thinks the point is well taken.

2197. In an argument as to the admissibility of evidence, it is not proper to read the very evidence objected to.—On February 23, 1905,[3] in the Senate sitting for the impeachment trial of Judge Charles Swayne, Mr. John M. Thurston, of counsel for the respondent, proposed to submit as evidence certain extracts from the official record of Congressional debates.

Mr. Manager Marlin E. Olmsted, of Pennsylvania, having objected, Mr. Thurston said:

I am offering the proceedings. They directly bear upon the construction of this act, and I have a right to refer to the Congressional Record in the debates, at least; for instance, Mr. Allen, in the Senate, when this provision was under consideration, offered the following—

Mr. Manager Olmsted said:

I object to the gentleman putting in an argument the evidence to which we object. I understand he was about to read from the debates.

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[1] Third session Fifty-eighth Congress, Record, pp. 2538, 2539.

[2] Orville H. Platt, of Connecticut, Presiding Officer.

[3] Third session Fifty-eighth Congress, Record, pp. 3165, 3166.

The Presiding Officer [1] said:

The Presiding Officer thinks that counsel can make the argument that he desires to make without reading the Congressional debates. He desires to show the nature of the evidence which he proposes to introduce by introducing these debates. They are something more than debates. They are action upon amendments and various motions that were made. The Presiding Officer thinks that that can be done without any actual reading of the debates. There can be statements by counsel as to the particular matter to which he wishes to call the attention of the Senate without reading the debates.

2198. The Chief Justice held, in the Johnson trial, that the offering of evidence might not be interrupted by a question relating to business incident to the trial or to legislative sessions.—On April 3, 1868,[2] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, the managers on behalf of the House of Representatives were engaged in offering certain documentary evidence, when Mr. Henry B. Anthony, a Senator from Rhode Island, proposed to call up for consideration a matter of business pending in a legislative session of the Senate.

The Chief Justice [3] said:

It is not in order to call up any business transacted in legislative session.

Thereupon Mr. Anthony, proposing to call the matter up as originating in the Senate sitting for the trial, moved that a place be assigned on the floor to the reporter of the Associated Press.

The Chief Justice said:

The Chief Justice thinks it is not in order to interrupt the business of the trial with such a motion.

2199. In the Belknap trial, by consent of both sides, a statement of what would be proven by an absent witness was admitted, subject to objection as to its relevancy.—On July 10, 1876,[4] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Matt. H. Carpenter, of counsel for the respondent, asked for the reading of two telegrams, one from Gen. W. T. Sherman and the other from Gen. P. H. Sheridan, setting forth that urgent military necessity rendered it desirable that the latter should not leave his post to testify before the Senate in this case. The telegrams having been read, Mr. Carpenter said:

In consequence of those telegrams, and not wishing to interrupt the public service unnecessarily, we have agreed, if the court will permit us, to let it go upon the record, as follows:

I. It is admitted that Lieut. Gen. Phil Sheridan would, if present, testify to the good official character of the respondent while Secretary of War.

II. That in regard to all the applications made for leave to sell liquors at the military posts the matter was referred by the Secretary of War to him, and by him investigated and reported on, and his report in all cases was adopted by the Secretary of War.

III. And that a part of a letter from him, Sheridan, to the Secretary of War, dated March 29, 1872, may be read in evidence and that the same, and said admission, shall be taken and regarded as testimony in this cause with the same effect as though General Sheridan had appeared and testified to the same effect.

It is understood, of course, that all these different points are subject to the objection that they are irrelevant or incompetent if the counsel on the other side chooses to raise that objection.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Second session Fortieth Congress, Globe supplement, p. 99.

[3] Salmon P. Chase, of Ohio, Chief Justice.

[4] First session Forty-fourth Congress., Senate Journal, p. 968; Record of trial, p. 219.

Mr. Manager John A. McMahon said:

We admit that he would be asked these questions and would answer in that way, provided they were competent or material.

2200. The presentation and reading of a document during introduction of evidence in an impeachment trial was held not to preclude an objection as to its admissibility.—On April 2, 1868,[1] in the Senate sitting for the trial of Andrew Johnson, President of the United States, Mr. Manager James F. Wilson, of Iowa, offered in evidence a certain letter from President Johnson to Gen. U. S. Grant.

The letter having been read, Mr. Henry Stanbery, of counsel for the President, asked that certain documents referred to by the letter as accompanying it be read. The managers having announced that they did not propose to offer the accompanying documents, Mr. Stanbery entered an objection to the admission of the letter without the accompanying documents.

Mr. Manager Wilson raised the point that the objection came too late, since the letter had been submitted and read and was in evidence.

The Chief Justice [2] said:

The Chief Justice is of opinion that objection may now be taken.

2201. In the Belknap trial the Presiding Officer, on request of respondent's counsel, required the reading in full of letters presented in evidence.—On July 8, 1876,[3] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Mr. Manager John A. McMahon, in the course of the introduction of testimony, offered a series of letters, the reading of which began.

Mr. George G. Wright, a Senator from Iowa, while admitting that the counsel had the right to have the letters read at length, asked if, in order to save time, they might not be regarded as read.

Mr. Matt. H. Carpenter, of counsel for the respondent, objected and demanded that the letters be read in full.

The President pro tempore [4] directed the reading to proceed.

2202. The Chief Justice held, in the Johnson trial, that offer of documentary proof should state its nature only, but that the Senate might order it to be read in full before acting on the objection.—On April 18, 1868,[5] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Alexander W. Randall, Postmaster-General, was sworn as a witness on behalf of the respondent, and testified that Foster Blodgett, postmaster at Augusta, Ga., had been suspended from office on complaints both written and verbal. Certified copies of the official papers relating to the removal were then offered in evidence by Mr. William M. Evarts, of counsel for the respondent.

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[1] Second session Fortieth Congress, Globe Supplement, pp. 81, 82.

[2] Salmon P. Chase, of Ohio, Chief Justice.

[3] First session Forty-fourth Congress, Record of trial, p. 206.

[4] T. W. Ferry, of Michigan, President pro tempore.

[5] Second session Fortieth Congress, Globe Supplement, p. 236.

Mr. Manager Benjamin F. Butler, having intimated that there might be objection, the Chief Justice [1] said:

The counsel for the President will state what they propose to prove in writing. * * * It will be necessary to state what the order and letters are; otherwise the court will be unable to judge of their admissibility.

Thereupon Mr. John Sherman, a Senator from Ohio, said:

I think we have a right to ask for the reading of the letters to know what we are called upon to vote.

The Chief Justice said:

The Senate undoubtedly have a right to order the letters to be read. * * * The usual mode of proposing to prove is by stating the nature of the proof proposed to be offered, and then, upon an objection, the Senate decides whether proof of that description can be introduced. It is not usual to read the proof itself. Undoubtedly it is competent for the Senate to order it to be read.

Mr. Evarts thereupon made this offer in writing:

We offer in evidence the official action of the Post-Office Department in the removal of Mr. Blodgett, which removal was put in evidence by oral testimony by the managers.

Mr. Butler having withdrawn all objection, the papers were then offered and read.

2203. Decisions as to the extent to which a witness in an impeachment trial may use memoranda to refresh his memory.—On February 11, 1805,[2] in the high court of impeachments during the trial of the case of United States *v.* Samuel Chase, one of the associate justices of the Supreme Court of the United States, George Hay was sworn as a witness, and made this statement:

The greater part of the evidence I am to deliver relates to what was said by me as counsel for J. T. Callender, who was indicted for a libel on the President of the United States, and what was said by one of the judges; for I do not recollect to have heard the voice of Judge Griffin at any time during the trial. In order to make this statement as accurate as possible, as my memory is not strong, it is necessary to resort to a statement made by myself and the counsel associated with me in the defense of J. T. Callender, which I now hold in my hand, and every part of which, according to my best recollection, is correct.

Mr. Robert G. Harper, counsel for the respondent, here interrupted Mr. Hay and said:

The witness may refer to anything done by himself at the time the occurrences happened which he relates. But I submit it to the court how correct it is to refer to what was not done by him, or done at the time.

The President asked Mr. Hay whether the notes were taken by him.

Mr. Hay said:

The statement was made by different persons. Some parts were made by myself, perhaps the greater part; the rest by Mr. Nicholas and Mr. Wirt. I believe I shall be able to state from it every material occurrence which took place at the time. With regard to those parts of the statement not made by me, a reference to them will call to my recollection the facts mentioned in such parts. If I state anything which I do not distinctly recollect, upon adverting to the statement, I will explain the actual situation of my mind on that point.

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[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] Second session Eighth Congress, Annals, pp. 193–195; Senate Impeachment Journal, p. 518.

Mr. Joseph H. Nicholson, of Maryland, one of the managers, said:

If I understand the witness, it is not his intention to give the paper in his hand as evidence, but merely to refer to it for the purpose of refreshing his memory.

Mr. Harper said:

I do not understand the way in which it is meant to use the paper. I apprehend that it is a rule of evidence that nothing but notes made at the time of the transactions related can be received as evidence. I therefore am of opinion that a reference to this statement is inadmissible, because a part of it is made by others, and none of it made at the time.

Mr. Caesar A. Rodney, of Delaware, one of the managers, said:

When we advert to what has been stated by the witness, who says he does not mean to state in evidence anything in the paper of which he has not, independently of it, a distinct recollection, I think it is within the law to admit him to avail himself of it. I apprehend that had I attended the trial of Callender and taken minutes, and others had attended and not taken notes, if by recurring to my notes there should be recalled to their recollection facts so distinctly that they could swear to them before the court, it would be competent to admit their reference to such notes.

Mr. George W. Campbell, of Tennessee, one of the managers, inquired whether the objection was not confined to that part of the statement not made by the witness?

Mr. Harper said the objection related to the whole of it.

Mr. Campbell believed that a witness might use any memorandum to refresh his memory; and that it was not necessary that it should be made at the point of time when the events happened. It is sufficient if made at a time when his remembrance of the facts was correct. With regard to that part not taken by himself, if he perused it at a time so shortly after the events related, as to be able to determine it accurate, and now recognize the memorandum to be the same, it was sufficient.

Mr. Luther Martin, counsel for the respondent, said he had been many years in the practice of the law. The rules of evidence were probably different in different States. But he had always supposed that a witness could not be permitted to use any memorandum not made by himself, or at the time of the events related, or near it. He may, before he comes into court, consult any memorandum for the purpose of refreshing his memory, but not in court.

The President [1] said:

The witness proposes to make use of a memorandum under the circumstances which he has stated. The question is, shall the witness be permitted to make use of it?

Mr. John Quincy Adams, of Massachusetts, a Senator, said:

I am not prepared to answer that question at present, not knowing the nature of the minutes the witness proposes to use. I therefore move that the Senate retire before the question is taken.

The question on retiring was taken, and on division lost.

Mr. Adams said he wished to see the papers before he voted.

The President asked Mr. Hay whether it was in his own handwriting.

Mr. Hay replied that it was not; but that it was written by a clerk from a printed statement.

[1] Aaron Burr, of New York, Vice-President, and President of the Senate.

The President asked:

Have you the parts made by yourself separate?

Mr. Hay said he had not.

The President then put the question:

Shall the witness be permitted to make use of, as a memorandum, a paper containing a statement of facts, composed by himself and other gentlemen, in relation to the trial of James T. Callender, sometime after the trial, the paper proposed to be made use of being a copy made by his clerk from a printed paper which contained the said statement.

And there appeared yeas 16, nays 18.

2204. On April 3, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, William N. Hudson was sworn and examined by the managers for the House of Representatives as to a certain speech of the President which he assisted in reporting at Cleveland, Ohio. Being questioned as to certain interruptions which the President experienced while speaking, the witness was told by Mr. Manager Butler that he might refresh his memory from any memorandum or copy of a memorandum. Witness then proceeded to use a copy of the newspaper in which the report was printed.

Mr. William M. Evarts, of counsel for the President, objected that the witness should speak by his recollection if he could. If he could not, he might refresh it by the presence of a memorandum which he made at the time.

The Chief Justice[2] having drawn from the witness that the memorandum made by him at the time was lost, and that the newspaper contained a copy of that memorandum, ruled as follows:

It is inquired on the part of the managers what interruptions there were, and the witness is requested to look at a memorandum made at the time in order to refresh his memory. Of that memorandum he has no copy, but he made one at the time, and it is lost. The Chief Justice rules that he is entitled to look at a paper which he knows to be a true copy of that memorandum. If there is any objection to that ruling, the question will be put to the Senate.

2205. It was held in the Peck trial that a witness might correct oral testimony already given by himself.

In correcting testimony previously given in an impeachment trial a witness was not permitted to put in a paper made up in part from the recollections of other persons.

On January 17, 1831,[3] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, William C. Carr presented himself before the court and stated that since the evidence had been closed a written statement of the testimony had been shown to him, from which he perceived that the evidence which he had given was in one point defective, from want of remembrance of certain circumstances. He now therefore prayed leave of the court to present a condensed statement of the facts which had been omitted. He had reduced them to writing under the solemnity of an oath. In doing so he had not chosen to rely altogether upon his own recollection, but had referred to that of two other witnesses in this cause, and also had consulted two other gentlemen concerned in the matter. He hoped that the court would deem this paper admissible. If not, he wished to be subjected to oral examination.

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[1] Second session Fortieth Congress, Globe Supplement, pp. 102, 103.

[2] Salmon P. Chase, of Ohio, Chief Justice.

[3] Second session Twenty-first Congress. Report of the trial of James H. Peck, pp. 286, 287.

Objection being made by the managers on behalf of the House of Representatives, the paper was withdrawn and the witness was examined orally.

On January 11,[1] B. C. Lucas had presented himself and addressed the court as follows:

I find it incumbent upon me to suggest to the court that since I gave my testimony some facts have occurred to my recollection which then escaped my memory.

Mr. Jonathan Meredith, counsel for the respondent, said:

The witness appears with a view of explaining or supplying a defect in his testimony as before delivered.

The President of the court[2] said:

The witness has a right to make an explanation of his testimony.

2206. Instance wherein depositions offered in an impeachment trial were purged of matters in conflict with the rule laid down as to evidence.— On January 10, 1831,[3] in the high court of impeachment, during the trial of the cause of The United States *v.* James H. Peck, Mr. Jonathan Meredith, counsel for the respondent, offered in evidence and read certain depositions. He stated that in consequence of decisions just made by the court of impeachment, relative to the admissibility of evidence, he had stricken from the depositions, which had been taken in Missouri, all those portions which were covered by the principles of the decision. The depositions, he said, had been examined jointly by the managers for the House of Representatives and himself, and the portions to be expunged had been mutually agreed upon.

2207. The Senate struck from the record of an impeachment trial certain statements of fact introduced by a manager in argument, without support of evidence.

On an order presented by a Senator in the course of an impeachment trial it was held that Senators might debate only in secret session.

An order affecting the conduct of a manager being presented during an impeachment trial, he was permitted to explain.

On April 16, 1868,[4] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Mr. Manager Benjamin F. Butler, in the course of a speech of protest against the delays of the proceedings, introduced certain tabular statements of the sales of gold by the Government, with the object of supporting his claim that the delay in the trial of the President was reacting unfavorably on the country. These statements were printed in the Globe for that day.

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[1] Report of trial of James H. Peck, p. 279.

[2] John C. Calhoun, of South Carolina, Vice-President and President of the Senate.

[3] Second session Twenty-first Congress, Senate Impeachment Journal, p. 332; Report of trial of James H. Peck, p. 239.

[4] Second session Fortieth Congress, Senate Journal, pp. 907, 908; Globe supplement, pp. 209, 210.

On April 17, the Senate having convened for the trial, Mr. Orris S. Ferry, a Senator from Connecticut, offered the following:

Whereas there appear in the proceedings of the Senate of yesterday as published in the Globe of this morning certain tabular statements incorporated in the remarks of Mr. Manager Butler upon the question of adjournment, which tabular statements were neither spoken of in the discussion nor offered or received in evidence: Therefore,

Ordered, That such tabular statements be omitted from the proceedings of the trial as published by rule of the Senate.

Mr. Thomas A. Hendricks, of Indiana, asked if it would be in order for a Senator to defend the Secretary of the Treasury against the attacks of the manager.

The Chief Justice [1] said that the rules positively prohibited debate. He said, however:

The question of order is made by the resolution proposed by the Senator from Connecticut. Upon that question of order, if the Senate desire to debate, it will be proper that it should retire for consultation. If no Senator moves that order, the Chair conceives that it is proper that the honorable manager should be heard in explanation.

Mr. Manager Butler thereupon made a brief explanation.

The order proposed by Mr. Ferry was then agreed to without division or debate.

2208. Having ascertained that certain testimony was within the scope of the articles of impeachment, the Senate reversed a decision that the testimony was immaterial.

Discussion as to whether or not the cross-examination in an impeachment trial may go beyond the scope of the direct examination.

Instance wherein a President pro tempore presiding at an impeachment trial made a decision as to evidence.

On July 7, 1876,[2] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, General Irvin McDowell, a witness for the Managers, was cross-examined by Mr. Matt H. Carpenter, of counsel for the respondent. It had been charged against the respondent that he had appointed one Marsh to be post trader at Fort Sill, but that the name of one Evans had been substituted, said Evans having contracted with Marsh to share with him the profits, while Marsh remained away from Fort Sill and at his home in New York, and, it was charged, shared the money sent by Evans with the respondent. The witness, by direction of the Secretary of War, had drawn an order relating to absentee post traders. The examination proceeded thus:

Q. (By Mr. Carpenter). In regard to the post trader residing at the post, was there any object in that except to keep him at all times subject to military regulation and bring him more nearly within the control of the men who ought to control—the military officers?—A. My own view in drawing up that order was aimed at the question in hand of there being what I supposed to be a post trader at Fort Sill residing in New York.

Q. Would it make any difference whether he resided in New York or any other place, provided the rates at which he must sell were fixed?—A. I do not know whether it would or not.

Q. Can you conceive any difference?—A. I will only say what was in my mind at the time I drew the order up, that it was with reference to correcting an admitted abuse.

Q. The abuse, as you understood it, was sales at extravagant prices, was it not?—A. No; it was a

[1] Salmon P. Chase, of Ohio, Chief Justice.

[2] First session Forty-fourth Congress, Senate Journal, pp. 962, 963; Record of trial, pp. 190–192.

man holding a place and exacting or receiving a large sum of money for it, having no capital, and doing no service for the money he received.

Q. Is there any way that that could injure the soldier or the country, unless he charged higher prices in consequence of that arrangement?

Mr. Manager John A. McMahon objected to this question, saying:

The objection we make to the question is that it is an endeavor to exculpate the accused by simply proving that he did not hurt the soldiers, although he may have hurt Evans. It seems to me that in the trial of a person for official malfeasance in an impeachment case, if we prove that the Secretary of War is in a corrupt combination with a person who has procured an appointment, by which the person who gets the appointment, for example—and I will give the example, Evans—is to divide the money that Evans may be able to force out of this person, to say that that is innocent simply because is does not raise the price of provisions at the garrison or the price of thread or cotton or whatever else may be wanted there, is certainly to the managers something new in the development of this case and of the theory of the defense. We do not care whether he raised the price of provisions a copper, from our standpoint.

Mr. Mongomery Blair, of council for the respondent, argued:

Mr. President and Senators, I beg to call the attention of the court to the fact that the gentleman in the close of his speech, and his colleague in the opening of his, assumed here as proved and established before this court the very thing that they have yet to prove, of which there is not a scintilla of proof before the court. He says, of course, if they prove that this defendant received this money it is an impeachable offense, and it does, not make any difference what this order was drawn for. He goes back constantly harping on that and repeating it as the substance of the thing proved, when it remains yet to be proved, and when the question before this court bears directly upon that question, to show that by the course of conduct adopted by this defendant he could not have known that there was any such contract in existence between these parties.

The effort which we are here now making and the effect of this proof is as positive as it can be made to negative the assumption upon which these gentlemen are asking these questions. Is it not legitimate for us to ask this witness—an experienced officer of the Army, who himself did call upon the Secretary to inform him of this evil in existence and to suggest remedies for it—whether or not the remedy which he himself suggested was not adequate to the evil which he undertook to meet? The question whether the trader lived at the post or anywhere else is, as we expect to show, utterly immaterial; and yet we see that that circumstance was made to figure in the opening of this argument, and is continued to this moment, as the only way of escape from the conclusion and weight of this testimony that the defendant misrepresented to the officer who drew this order the fact that the trader resided not at the post but in New York.

The witness has not said any such thing; he has not said at all that this defendant represented to him any such thing. He has not said that, to begin with. Those are words put into his mouth by these gentlemen. He has not asserted at any time that the defendant told him that the trader lived in New York and that this was carried on for that purpose. He says, to be sure, that, as he now recollects it, he understood the fact to be that he did reside somewhere else; but we will show him and show this court before we get through that in that his recollection is mistaken. We will show him that he knew then, at the time, that the trader did not live in New York, but lived at the post. Hence this totally immaterial circumstance in its bearing upon this order is utterly swept out of the way, and the testimony will be left to bear with its whole force upon the fact that this defendant did not know and could not know of the existence of this contract which is the basis of the proceedings.

I therefore insist that this is a principal, material question to be answered by the witness, and the fact of the resistance to it makes it manifest to the court that it is a pretty material question.

The question being submitted to the Senate, the question was excluded; yeas 20, nays 31. So the Senate sustained the objection.

Before the above vote had been taken Mr. Samuel J. R. McMillan, a Senator from Minnesota, had briefly called attention to the fact that in one of the articles of impeachment it was charged that Evans was retained in office by the Secretary of

War not only corruptly, but that his retention there was "to the great injury and damage of the officers and soldiers of the Army of the United States stationed at said post, as well as of emigrants, freighters, and other citizens of the United States," etc., and suggested that although that issue might not be the only issue in the case, it was an issue that might be a material one, and upon which the Senate would have to pass in their finding.

Soon after the vote,[1] the same witness being under cross-examination, Mr. Carpenter asked:

It is charged in the third article of impeachment that the things alleged to have been done there—that is, the making of this agreement between Evans and Marsh—had been to the great injury and damage of the officers and soldiers of the Army of the United States stationed at that post. In what way could such contract injure the officers of the United States?

Mr. Manager McMahon having objected, the President pro tempore[2] sustained the objection on the ground that a similar question had already been ruled out.

Mr. Carpenter having protested and asked for a hearing, Mr. A. S. Merrimon, a Senator from North Carolina, asked for a vote on the ruling of the Chair, and the President pro tempore submitted the question:

Shall this interrogatory be admitted?

In arguing, Mr. Manager McMahon said:

We have yet offered no proof in this case to show that this has been detrimental to the service of the United States in the view in which the ethics of the gentleman seem to indicate to him may be important. It is a matter really for him in the defense if there is anything in it; and he has no right when we put a witness upon the stand to go into his substantive defense on that point.

The second objection we have in this case is the one which the Senate has already decided. Suppose that we should, taking an indictment, find in that indictment that the offense charged was alleged to be against the peace and dignity of the State of Ohio, or the State of New York, or against the commonwealth; and you were to put a witness on the stand and attempt to prove that it was not against the peace and dignity of the State of Ohio or the State of New York, because it was done in a corner where the State did not see it or had nothing to do with it, and would not know it unless one of the parties told it. It seems to me that it is entirely irrelevant, and it certainly strikes me as a new argument in morals that it is not improper, not an impeachable offense, for a Secretary of War or a Secretary of the Navy to dole out his offices to the men that will make the best bargain with him, without reference to the question whether it may be injurious to the public service or not.

Mr. Carpenter argued—

there is, as every lawyer knows, a conflict in the decisions in England and in some of the States of this country in regard to the extent to which a cross-examination may go. The rule in England, I understand to be, and in many of the States, that when a witness is called upon the stand, the other party may cross-examine him as to anything pertinent to the issue. The rule in other States is the reverse, and the rule I am bound to say in the Supreme Court of the United States is that you can only cross-examine as to matters referred to by the direct examination. But I submit to the Senate that in this trial, circumstanced as we are, with many army officers in attendance here whose public duties, as important as the duties of any officer, require their immediate return, and who are staying here every day to the prejudice of the public service, that rule, which after all is one in the discretion of the court, should in this case be, as I understand the English rule to be, that we may ask any witness called to the stand any question pertinent to the issue. There are many advantages in this. In the first place, it will place before the Senate in a compact form most of the testimony upon a particular subject.

In the next place, it will be a great convenience to all these witnesses. I do not understand, how-

[1] Senate Journal, p. 963; Record of trial, pp. 192–194.

[2] T. W. Ferry, President pro tempore.

ever, that I am now going at all beyond the scope of the direct examination. I make this remark because the question will undoubtedly arise hereafter as to other witnesses.

Now the managers say they have not as yet introduced any proof to show that this arrangement was detrimental to anybody. If they admit that it was not, then I do not wish to take a moment of your time in proving that it was not. If they concede that not a soldier paid one cent more for any article that was sold at that post in consequence of this arrangement between Marsh and Evans, that is the end of it. That is all I want to show by this testimony; but we are able to show, and shall if permitted, that notwithstanding this arrangement between Evans and Marsh, Evans never increased his prices on a single article. He has, as he has sworn elsewhere, upon the general average of his prices, charged less than he did before the arrangement made with Marsh.

The question being put on admitting the interrogatory, it was decided in the negative without division.

A little later,[1] the same witness having testified to his official relations with the respondent Mr. Carpenter asked, on cross-examination:

What has been his character as Secretary of War?

Mr. Manager McMahon said:

We object to this question, and will state our objection to the Senate. I think this is clearly substantive matter of defense, and must come into the trial of this case when the defendant opens his side of the case; but I will say to the gentleman here, though it may not waive the proof upon his part, that the managers upon their part, as I understand, are perfectly willing to concede that up to the time of the development of these matters his character was as good as could be desired or wished.

Mr. Carpenter said:

This question, Mr. President and Senators, falls within the class of questions to which I before referred. Of course it is not a cross-examination, but if not answered now, it may make it necessary to keep General McDowell here for several days before it can be put in. I therefore offer it now and let the Senate rule upon it, and then, of course, we shall know exactly what course to take in regard to other evidence from other witnesses.

The Senate, without division, decided that the question should be admitted.

On July 19[2] John S. Evans, the post trader at Fort Sill, was a witness and was asked this question by Mr. Carpenter:

After you returned to Fort Sill and after that contract made between you and Mr. Marsh, by which you bound yourself to pay him sums of money on dates fixed in the contract, did you put up the prices of your goods at the fort?

Mr. Manager McMahon objected that the Senate had already decided that this line of inquiry was not permissible.

Mr. Carpenter argued:

The fourth article, if I remember the number rightly, charges that in consequence of this arrangement between Marsh and Evans the soldiers and officers of the Union Army were defrauded and compelled to pay extravagant and exorbitant prices. Now we offer to show that that is not true. Let the managers strike it out of the articles and we do not care for the proof. If it remains in the articles, we offer to disprove it and will prove by this witness that he not only did not increase his prices, but that they were absolutely lower from that time out until he was removed than they had ever been before, and not, as he expresses it, the one-tenth part of 1 cent was added to the price of goods sold to the soldiers in consequence of that arrangement.

The Senate, by a vote of yeas 26, nays 13, decided that the question should be admitted.

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[1] Senate Journal, p. 963; Record of trial, p. 195.

[2] Senate Journal, p. 982; Record of trial, pp. 279, 280.

2209. In the Belknap trial the Senate permitted a redirect examination which was not responsive to the facts elicited in cross-examination.—On July 11, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness on behalf of the United States, was, after the direct examination, cross-examined by Mr. Matt. H. Carpenter, of counsel for the respondent.

At the conclusion of this cross-examination, Mr. John A. McMahon, of the managers on the part of the House of Representatives, resumed examination, which proceeded:

Do you remember upon any occasion when Evans & Co. made payment in a check of Northrop & Chick to you for $500?

Mr. Montgomery Blair, of counsel for the respondent, objected to the question, for reasons stated by Mr. Carpenter:

We have simply cross-examined this witness. We have shown nothing whatever, nor have we attempted to show anything whatever, except what is legitimate matter of cross-examination. They may reexamine in regard to the new matters we have called out in cross-examination, but nothing else. They can not go on now and by this witness attempt to show any consideration or anything of that kind, because that is a part of their case; they have examined the witness upon that subject and called out from him such evidence as they could and passed him over for cross-examination, and they can not return to it now.

Mr. Allen G. Thurman, a Senator from Ohio, suggested:

I wish to suggest that even if the question is not strictly responsive to the cross-examination it is in the discretion of the court to permit it to be answered.

The question being put to the Senate, "Shall said interrogatory be allowed," it was decided in the affirmative without division.

2210. In the Swayne trial it was held that cross-examination should be responsive to the examination in chief.—

On February 20, 1905,[2] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness, Simeon Belden, was under cross-examination by Mr. John M. Thurston, of counsel for the respondent, and the following occurred:

Q. As your associate, did he have authority to sign your name, together with his own, as counsel in the matter of these proceedings?—A. He had not—not that I recollect.

Mr. THURSTON (handing paper to Mr. Manager Olmsted). As a part of our cross-examination we offer this paper in evidence.

The paper, which was afterwards read, was as follows:

LAW NO. 72, IN THE UNITED STATES CIRCUIT COURT FOR THE NORTHERN DISTRICT OF FLORIDA. MRS. FLORIDA M'GUIRE V. PENSACOLA CITY COMPANY ET AL.

HON. F. W. MARSH,

Clerk United States Circuit Court, Northern District of Florida.

DEAR SIR: Please enter the above cause on the trial or call docket for trial at the coming term of court.

LOUIS P. PAQUET,
SIMEON BELDEN,
Attorneys for Plaintiff

PENSACOLA, FLA., *October 28, 1901.*

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[1] First session Forty-fourth Congress, Senate Journal, p. 971; Record of trial, p. 237.

[2] Third session Fifty-eighth Congress, Record, p. 2900.

Mr. Manager David A. De Armond, of Missouri, suggested an objection.

Mr. Thurston said:

If I understand evidence, a paper which is a legitimate part of the res gestse, of the transaction upon which the witness was examined in chief, may be offered when identified as a part of the cross-examination. We may never desire to present any case on our side, but we can not tell until we have the evidence on the other side in.

Mr. Manager De Armond said:

Mr. President, we do not want to be understood as conceding the proposition which the counsel for the respondent has just stated. The question of the admissibility of a paper is a question that will have to be determined when it is offered; and, of course, if a paper could be introduced as a matter of cross-examination, the question of its competency could not be considered, or there would have to be delay to consider the admissibility of something offered by the opposite side when we are offering our testimony. But as to this paper, and only as to this paper, we do not care.

The Presiding Officer [1] said:

The Presiding Officer understands it is offered merely as a part of the cross-examination. * * * Whether it becomes admissible or pertinent in any other view of the case is a matter to be determined afterwards.

Later, on the same day,[2] and during the cross-examination of the same witness, the following occurred:

Q. You afterwards tried that same case, after it was rebrought, in that same court—A. Yes, air.

Q. And there you had every opportunity to secure your witnesses, did you not?—A. We had all facilities on that trial.

Q. You got all the witnesses you wanted?—A. I think we did.

Q. I will ask you to examine this paper [handing paper to witness] and see if it is the praecipe for witnesses filed by you as the witnesses you desired subpoenaed for that trial of the case when it did come on?—A. I suppose this is the list. I did not make it out; neither did I sign it.

Q. Signed by your associate, Mr. Davis, for himself and yourself?—A. I think so.

Mr. Thurston said:

Mr. President, it is not necessary to introduce this original paper in evidence, as it already constitutes a part of the record that the other side has put in. Possibly I may be mistaken, the whole record may not have gone in. I ask to have read the names of these witnesses and their residences as showing that all their witnesses, very few in number, resided immediately in and about the courthouse at Pensacola.

The Presiding Officer said:

The Presiding Officer has some trouble about having these documents read by the Secretary. Counsel undoubtedly have a right to ask the witness on cross-examination, the witness having testified that there were forty or fifty witnesses, how many witnesses were used when the case came to trial. But the Presiding Officer can not see how it is proper at this time to have this part of the record read. The cross-examination can proceed without the introduction of the paper.

Mr. Thurston said:

Mr. President, we submit to the ruling. We will offer the paper in our own time, when that comes.

2211. On February 20, 1905,[3] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness, Simeon Belden, was under cross-examination by Mr. John M. Thurston, of counsel for the respondent, when the following occurred:

Q. This contempt proceeding was brought jointly against you, Davis, and Paquet, was it not?—A. Yes, sir.

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[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Record, pp. 2901, 2902.

[3] Third session Fifty-eighth Congress, Record, p. 2905.

Q. At the time you have Spoken of it was only tried as to Davis and yourself?—A. Yes, Sir.

Q. Further proceedings were thereafter had in that case against your associate, Mr. Paquet, were they not?—A. Other proceedings were had later on.

Q. And those resulted in his making and filing a written apology, did they not?

Mr. Manager David A. De Armond, of Missouri, said:

Mr. President, we are about to object to that. There is a better way of proving that, if it is true, and then it has nothing to do with the case, anyhow. There is no proceeding against Judge Swayne here regarding what he did or did not do with respect to Judge Paquet, and even if it is important to ask what he did or did not, or why he did or did not do it, there is a better way of showing it.

Mr. Thurston said:

I offered it as a part of the res gestae.

The Presiding Officer [1] said:

The Presiding Officer does not see how that is a part of the cross-examination of this witness upon anything he said. * * * It may become admissible when counsel for the respondent take up the case. The Presiding Officer does not see how it is cross-examination.

2212. Rulings in the Swayne trial as to right of counsel of respondent to introduce documents in evidence during their cross-examination of witnesses for the managers.—On February 15, 1905,[2] in the Senate sitting for the impeachment trial of Judge Charles Swayne, a witness for the managers, Elza T. Davis, was under cross-examination by Mr. Anthony Higgins, of counsel for the respondent, when these questions were asked and answered:

Q. (Producing paper.) Mr. Davis, will you kindly look at the paper I hand you and say whether or not that is your signature?

A. (After examining paper.) Yes, Sir; that is my signature.

Q. Is that a paper presented for you in the United States circuit court for the fifth judicial circuit, relating to the habeas corpus?

A. I do not think it was presented in my case. I think that is an affidavit which was prepared in New Orleans, which Judge Paquet had prepared, and which I signed.

Mr. HIGGINS. If the court please, this is an original paper, and I offer it in evidence.

Mr. Manager David A. De Armond, of Missouri, objected that the paper might not thus be introduced in evidence.

The Presiding Officer [1] said:

The Presiding Officer thinks that it is hardly proper to offer this document in evidence on the part of counsel at this time. If they desire to cross-examine the witness upon anything contained in this document, they can do so without offering it formally as evidence now. * * * The Presiding Officer understands that the witness under cross-examination has been asked if a certain document bears his signature, and he says that it does. The Presiding Officer supposes that it is entirely proper for counsel upon cross-examination to ask him any proper question relating to what is in the document, but that this is not the time to offer it in evidence.

2213. Instance wherein during cross-examination in an impeachment trial the Senate sustained objection to evidence on a point not touched in direct examination and of doubtful pertinency.—On July 10, 1876 [3] in the Senate sitting for the impeachment trial of William W. Belknap, late

[1] Orville H. Platt, of Connecticut, Presiding Officer.

[2] Third session Fifty-eighth Congress, Record, p. 2622.

[3] First session Fifty-fourth Congress, Senate Journal, p. 970; Record of trial, p. 234.

Secretary of War, Gen. William B. Hazen, a witness on behalf of the United States, was cross-examined by Mr. Matt. H. Carpenter, of counsel for the respondent. A question arose as to whether or not respondent had ordered witness to a Dakota station as a punishment for testimony given before a committee of the House of Representatives in relation to the post tradership at Fort Sill, and Mr. Carpenter offered, in this connection, as follows:

The offer is to show that the President ordered Mr. Belknap as Secretary of War to send a regiment of infantry to Dakota; that Belknap ordered General Sherman to send a regiment of infantry to Dakota; that Sherman ordered General Sheridan to send a regiment of infantry to Dakota; that Sheridan ordered General Pope to send a regiment of infantry to Dakota, and Pope designated the Sixth Infantry, of which Colonel Hazen happened to be colonel. That is all the connection Belknap had with that transaction, and there is the proof of it. [Holding up a bundle of papers.] We offer these papers.

Mr. Manager McMahon said:

We object, and I will state the ground of our objection. We have given no evidence on this point. We concluded the examination of General Hazen without asking him when or where he was ordered after he had given the testimony before the House committee. We did so because we did not desire to encumber this record or this case with any other question except the one legitimately before the Senate. We did it because we were aware of General Hazen's own letter from which we might have drawn our own conclusions, but we care to draw none now and have made nothing upon it; and, as I repeat to the gentleman, he is endeavoring in this case to try a side issue, that side issue being in the first instance whether General Hazen had told the truth about a particular matter; and in the second instance (which has no connection with this case) whether General Belknap sent him to the frozen country because General Hazen testified before the Military Committee.

The question being submitted to the Senate, the evidence was excluded without division.

2214. The Chief Justice held, in the Johnson trial, that a witness recalled to answer a question by a Senator might be reexamined by counsel for respondent.

The Chief Justice declined to rule finally that cross-examination of a witness in an impeachment trial should be concluded before his dismissal.

On April 13, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, Gen. William T. Sherman was recalled as witness at the request of Mr. Reverdy Johnson, a Senator from Maryland, and was asked a certain question submitted in writing by Mr. Johnson, and admitted, after objection, by vote of the Senate.

The witness having answered the question, Mr. Henry Stanbery, of counsel for the respondent (in whose behalf General Sherman had been called originally as a witness), proposed another question.

Mr. Manager Benjamin F. Butler objected that, as counsel for respondent had dismissed the witness, he might not be examined again by counsel for respondent when brought back by a question of the court.

The Chief Justice[2] said:

The Chief Justice thinks it is entirely competent for the Senate to recall any witness. The Senate has decided that the question shall be put to the witness. That amounts to a recalling of him, and the Chief Justice is of opinion that the witness is bound to answer the questions. Does any Senator object?

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[1] Second session Fortieth Congress, Globe supplement, p. 169.

[2] Salmon P. Chase, of Ohio, Chief Justice.

A little later Mr. Stanbery proposed another question to the witness, and Mr. Manager Butler objected again to the renewal of the examination by the counsel for the President.

The Chief Justice said:

Nothing is more usual in courts of justice than to recall witnesses for further examination, especially at the instance of one of the members of the court. It is very often done at the instance of counsel. It is, however, a matter wholly within the discretion of the court, and if any Senator desires it the Chief Justice will be happy to put it to the court, whether the witness shall be further examined.

Argument arising, Mr. William M. Evarts, of counsel for the President, said:

The question, Senators, whether a witness may be recalled is a question of the practice of courts. It is a practice almost universal, unless there is a suspicion of bad faith, to permit it to be done, and it is always in the discretion of the court. In special circumstances, where collusion is suspected between the witness and counsel for wrong purposes adverse to the administration of justice, a strict rule may be laid down. Whatever rule this court in the future shall lay down as peremptory, if it be that neither party shall recall a witness that has been once dismissed from the stand, of course, will be obligatory upon us, but we are not aware that anything has occurred in the progress of this trial to intimate to counsel that any such rule had been adopted, or would be applied by this court.

Mr. Manager Butler said:

Mr. President, on Saturday this took place. This question was asked:

"In that interview"—

That is, when the offer was made—

"what conversation took place between the President and you in regard to the removal of Mr. Stanton?

That question was offered to be put, and after argument, and upon a solemn ruling, twenty-eight gentlemen of the Senate decided that it could not be put. That was exactly the same question as this, asking for the same conversation at the same time. Then certain other proceedings were had, and after those were had the counsel waited some considerable time at the table in consultation, and then got up and asked leave to recall this witness this morning for the purpose of putting questions. The Senate gave that leave and adjourned. This morning they recalled the witness and put such questions as they pleased, and we spent as many hours, as you remember, in doing that. On Saturday they had got through with him, except that they wanted a little time to consider whether they would recall him; they did recall him this morning, and after getting through with him the witness was sent away. Then he was again recalled to enable one of the judges to put a question to satisfy his mind. Having put his question and satisfied his mind of something that he wanted satisfied, something that he wanted to know, how can it be that that opens the case to allow the President's counsel to go into a new examination of the witness? How do they know, if he is not acting as counsel for the President, and there is not some understanding between them, which I do not charge—how can the President's counsel know that his mind is not satisfied? He recalled the witness for the purpose of satisfying his own mind, and only for that reason. I agree it is common to recall witnesses for something that has been overlooked or forgotten, but I appeal to the Presiding Officer that while—and I never have said otherwise—a member of the court who wants to satisfy himself by putting some question may recall a witness for that purpose, it never is understood that that having been done the case was opened to the counsel on either side to go on and put other questions. The court is allowed to put the question, because it is supposed that the judge wants to satisfy his mind on a particular point. After the judge has satisfied his mind on that particular point then there is to be an end, and it is not to open the case anew. I trust I have answered the honorable Senator from Maryland that I meant no imputation. I was putting it right the other way.

After further argument, the Chief Justice said:

The Chief Justice will explain the position of the matter to the Senate. The Senator from Maryland desired that the following question should be put to the witness (General Sherman): "When the President tendered to you the office of Secretary of War ad interim on the 27th of January, 1868, and on the 31st of the same month and year, did he, at the very time of making such tender, state to you what his purpose in so doing was?" To that question the witness replied, "he did" or "yes." That answer

having been given, the Senator from Maryland propounded the further question, "The witness having answered yes, will he state what he said his purpose was?" The witness having made an answer to that question, either partial or full, the Chief Justice is unable to decide which, the counsel for the President propose this question: "Have you answered as to both occasions?" That is the same question which the Senator from Kentucky now proposes to the Chief Justice, and which he is unable to answer. The Senator from Oregon [Mr. Williams] objects to the question proposed by the counsel for the President upon the ground that General Sherman, having been recalled at the instance of a Senator, and having been examined by him, he can not be examined by counsel for the President. The Chief Justice thinks that that is a matter entirely within the discretion of the Senate, but that it is usual, under such circumstances, to allow counsel to proceed with their inquiries relating to the same subject-matter.

The question was then put to the witness.

Later, as the witness had concluded, Mr. Manager Bingham stated that the managers might desire to recall him on the morrow.

Mr. William M. Evarts, of counsel for the President, then said:

We must insist, Mr. Chief Justice, that the cross-examination must be finished before the witness is allowed to leave the stand.

After brief discussion the Chief Justice said:

Undoubtedly the general rule is that if the managers desire to cross-examine they must cross-examine before dismissing the witness, but that will be a question for the Senate when General Sherman is recalled.

2215. The Senate decided in the Belknap trial that a witness recalled, after direct and cross examination, to answer a question by a Senator might not be again subjected to direct examination.—On July 11, 1876,[1] in the Senate sitting for the impeachment trial of William W. Belknap, late Secretary of War, Caleb P. Marsh, a witness for the United States, had been examined by the managers, cross-examined by counsel for the respondent, and had responded to questions put by Members of the Senate. Then Mr. Manager John A. McMahon proposed a question.

To this Mr. Matt. H. Carpenter, of counsel for the respondent, objected, saying:

Both parties have made this case to the Senate as they have chosen to make it; and the court has gone through in its own way, searching for facts, and, I understand, has rested also. Now, is it possible that the parties are to take this case up again and have any rights they would not have, arising from the examination as it took place on their part respectively? They can not go back with such a question certainly, unless it be on account of some questions that the court has put; and that certainly can not renew their right. They put this witness on the stand and exhausted him as far as they thought it was safe to do so; then we cross-examined him; both parties rested; and now the court has rested. Now we protest that the managers can not ask any more questions of this witness.

Mr. McMahon argued:

I understand even the order in which a witness is examined in a court of justice to be always a matter within the discretion of a court. A witness who has been fully discharged and gone may be called back and asked a question because something new has been developed in the case; and often—it is so laid down in the elementary books—you may recall a witness who has been absolutely discharged to ask him whether upon a certain occasion at a certain place he did not say so and so to A B, for the purpose of calling A B right there to contradict him. That is a very common practice.

Now, after the Senate has in the exercise of its discretion put further questions to this witness and eliminated a part of the truth from his bosom, what we want now is directly in the same line to put a question throwing light upon the very questions that have been put.

[1] First session Forty-fourth Congress, Senate Journal, p. 973; Record of trial, pp. 240, 241, 243.

Mr. Montgomery Blair, of counsel for the respondent, replied:

I know what the gentleman says to be true that a witness may be recalled at any time at the discretion of the court; but the court presides over the trial and looks after the interests of justice, and therefore it is within the competency of the court, as every lawyer knows, to allow a witness to be recalled. But I appeal to this court and to its discretion and ask this court to consider whether it is just to allow this witness to be recalled and reexamined in the manner that it is now sought to do when the gentlemen have made their case, exhausted the witness, turned him over to us and we made a very brief cross-examination, and now when the manager seeks to have the last word of this witness and to reiterate and ding-dong in the ears of the Senate every time he makes a speech denunciations of our client as if he was appealing on the last argument of the case? I appeal to the Senate and to the justice of the Senate to know whether such a course of examination ought to be tolerated.

The point having been raised that the question had been already asked in practically the same form, Mr. McMahon withdrew it.

But soon thereafter, the witness in the meanwhile having answered questions put by Senators, Mr. Manager McMahon proposed another question.

Mr. Carpenter said:

That we object to. Unless the court mean to say that the whole case may now be opened by the managers, that is an improper question. It is their direct proof, and they have gone over that.

The Senate, without division, sustained the objection and excluded the question

2216. In the Johnson trial the Senate declined to admit as rebutting evidence a document not responsive to any evidence offered on the other side.—On April 20, 1868,[1] in the Senate sitting for the impeachment trial of Andrew Johnson, President of the United States, after the defense had concluded their testimony, Mr. Manager Benjamin F. Butler proposed to put in evidence the nomination sent by the President to the Senate on the 13th of February, 1868, of Lieutenant-General Sherman to be general by brevet, and the nomination of Maj. Gen. George H. Thomas, sent to the Senate on the 21st of February, 1868, to be lieutenant-general by brevet and general by brevet.

Mr. William M. Evarts, of counsel for the respondent, objected:

It does not seem to us, Mr. Chief Justice and Senators, to be relevant, and it certainly is not rebutting. We have offered no evidence bearing upon the only evidence you offered under the eleventh article, which was the telegrams between Governor Parsons and the President on the subject of reconstruction. We have offered no evidence on that subject. * * * It is very apparent that this does not rebut any evidence we have offered. It is then offered as evidence in chief that the conferring of brevets on these two officers is in some way within the evil intents that are alleged in these articles. We submit that on that question there is nothing in this evidence that imports any such evil intent.

To this Mr. Manager Butler replied:

I only wish to say upon this that we do not understand that this case is to be tried upon the question of whether evidence is rebutting evidence or otherwise, because we understand that to-day the House of Representatives may bring in a new article of impeachment if they choose, and go on with it; but we have a right to put in any evidence which would be competent at any stage of the cause anywhere. * * * In many of the States—I can instance the State of New Hampshire—I am sure the rule of rebutting evidence does not obtain in their courts at all. Each party calls such pertinent and competent evidence as he has up to the hour when he says he has got through from time to time; and in some other of the States it is so applicable, and no injustice is done to anybody.

The Chief Justice having submitted the case to the Senate, there appeared in favor of receiving the evidence, yeas 14, nays 35. So the evidence was not received.

[1] Second session Fortieth Congress, Senate Journal, p. 915; Globe Supplement, p. 247.

2217. The question as to whether or not testimony in an impeachment trial might be taken by a committee of the Senate.—On March 25, 1904,[1] in the Senate, Mr. George F. Hoar, of Massachusetts, submitted the following resolution, which was considered by unanimous consent and agreed to:

Resolved, That the Committee on Rules be directed to consider and report whether any amendment be desirable in the Senate rules relating to impeachments, and especially whether the rules may properly and lawfully provide for taking testimony in such cases by a committee in accordance with the practice of the English House of Lords in such cases, questions of the admission of material testimony and the final argument being reserved for the full Senate.

[1] Second session Fifty-eighth Congreas, Record, p. 3660.